THE LIFE OF The Right Honourable Sir *JOHN HOLT*, Knight, Lord Chief Justice of the Court of King's-Bench;

CONTAINING

Several Arguments touching the Rights and Liberties of the People, delivered by his Lordship, with great Reason and remarkable Courage, upon most important Occasions, during the Reigns of their Majesties, King *William* the *third*, and Queen *Anne*; taken from the Report of the Lord Chief Justice *Raymond*, *&c.*

AND

An Abstract of Lord Chief Justice *Holt*'s Will, Codicils, *&c.*

ALSO

Points of Law, resolved by his Lordship, on Evidence, at *Nisi Prius*.

WITH

A Table of References to all his Lordship's Arguments and Resolutions in the several Volumes of Reports,

Never before published.

Libertatis, ac Legum Anglicarum
Assertor, Vindex, Custos,
Vigilis, Acer, et Intrepidus.

By a Gentleman of the *Inner-Temple*.

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perty; his Lordſhip was always remarkably ſtrenuous in nobly aſſerting and as vigorouſly ſupporting the Rights and Liberties of the Subject, to which he paid the greateſt Regard upon all Occaſions, and never ſuffered the leaſt Reflection tending to depreciate either to paſs uncenſured, or indeed, without the ſevereſt Reprimand; in Confirmation of which, we have inſerted the following moſt extraordinary Inſtance.

" Mrs. *Stout*, [a] Mother of Mrs. *Sarah Stout*, ſued a Writ of Appeal out of *Chancery* againſt *Spencer Cowper*, Eſq; youngeſt [b] Son of Sir *William Cowper*, Baronet, Barriſter [c] at Law, Juſtice of Peace, Captain of the Militia, [and afterwards King's [d] Council, and one of the [e] Juſtices of the Court of *Common Pleas*] for the ſuppoſed [f] Murder of her Daughter, in the Name of an Infant, who was a Relation to the ſaid *Sarah Stout*, and Her Heir; and before the Writ was returnable, procured himſelf to be admitted Guardian to the Infant in the ſaid Appeal by the Lord Chief Juſtice [g] *Holt*, at his Chambers. After this, the Friends and Mother of the Infant, being [h] influenced

[a] Lord *Raym.* Rep. P. 555.
[c] Mod. Rep. 12 Vol. P. 372.
[d] Id. P. 478.
[e] Lord *Raym.* Rep. 2 Vol. P. 1510. Append. to *Chron. Juridicial.* P. 17.
[h] See his Trial in *Salmon*'s critical Review of the State Trials, P. 717. where you will find his Obſervations upon that Trial. He ſays, it was one of the moſt memorable ones in the Age, and the World, to this Day, divided in their Opinions, concerning the Innocency of the Priſoner. Id. Ibid. It is the firſt Trial in the Collection, publiſhed in 1734, in four Volumes folio.

ced by the [l] *Cowpers*, went to the Under-ſheriff with the Infant, and demanded of him the Writ of Appeal, who delivered it accordingly, whereupon the Writ was burnt, and ſo loſt."

"In this [k] Caſe, the Year being expired, they could not have a new Writ of Courſe, and therefore, afterwards, in the Vacation before [l] *Trinity* Term, 1701, 13 *Will.* 3. a Petition was preferred to Sir *Nathan Wright*, [l] lately made Lord Keeper of the Great Seal of *England*, to have a new Writ of Appeal granted. But upon the Hearing of Council on both Sides, more than ſix Hours before him, aſſiſted by Lord Chief Juſtice *Treby*, the Lord Chief Baron *Ward*, and Mr. Juſtice *Powel*, (whom my Lord Chief Juſtice *Holt* ſent in his Place) and Sir *John Trevor*, the Maſter of the Rolls; by the unanimous Opinion of them all, the Petition was rejected. Some, [k] eſpecially *Treby*, alledging for Reaſon, that an Appeal was a revengeful odious Proſecution, and therefore deſerved no Incouragement, upon which Occaſion *Holt*, with great Vehemence and Zeal, ſaid, "he wondered that any *Engliſhman* ſhould brand an Appeal with the Name of an [m] odious Proſecution, for his Part, he looked upon it to be a noble [n] Remedy, and a true Badge of the *Engliſh* Rights and Liberties, and referred to the Statute of *Glouceſter*, Chap. 9. [6 *Edw.* 1. 1278.] [o] and

[l] Mod. Rep. 12 Vol. P. 373.
[k] Mod. Rep. 12 Vol. P. 375.
[l] Lord *Raym.* Rep. P. 557.
[m] Lord *Raym.* and Mod. as laſt above.
[n] Lord *Raym.* as laſt above.
[o] 2 *Inſt.* 279.

and the Comment thereupon, in 2 *Inſt.* 314. which [p] Statute has provided, That an Appeal ſhall not be abated ſo lightly as before it has been; but if the Appellant declares the Fact, the Year, the Day, the Hour, the Time of the King, and with what Weapon, the Appeal ſhall be maintained. And 3 *Hen.* 7. Chap. 1. which gives Power to proceed at the Suit of the King within the Year, does yet ſave the Appeal to the Party after Acquittal. And therefore, ſince this Remedy has been favoured by Acts of Parliament, and tends to the Support of Families, and is of evident Neceſſity in ſome Caſes (to ſay nothing of this preſent Caſe, but only that a very odd Method has been taken, and that too publicly avowed, for withdrawing this Appeal) the Judges ought to encourage Appeals."

No Chief Juſtice, perhaps, ever continued in that Poſt ſo long as Lord Chief Juſtice *Holt* did; his Lordſhip having maintained it twenty [q] two Years ſucceſſively, with great Reputation for his Courage, Integrity, and compleat Knowledge in his Profeſſion; he applied himſelf with great Aſſiduity to the Functions of his important Office; he was a perfect Maſter of the Common Law, and as his Judgment was moſt ſolid, his Capacity vaſt, and Underſtanding moſt clear, ſo had he a Firmneſs of Mind, and ſuch a Degree of Reſolution, as could never be brought to ſwerve in

[p] Lord *Raym.* as laſt above.
[q] *Le Neve's Monument. Anglican.* 1 Vol. P. 168.
[r] *Burnet's* Hiſt. of his own Times, 2 Vol. P. 543.

in the leaſt from what he thought to be Law and Juſtice; he had [s] upon great Occaſions ſhewed an intrepid Zeal in aſſerting the Authority of the Law; for he ventured to incur the Indignation of both Houſes of Parliament by Turns, when he thought the Law was with him: Thoſe who had the Happineſs of living in his Time, were more immediately ſenſible of his Juſtice, Wiſdom, and Integrity. His Advancement to the honourable Station which he ſo long and ſo well filled, is an unerring Proof that real Merit will make it's own Way without any Aſſiſtance, without any little mean Arts and Aſſiduities, and that the only certain Method to obtain true Honor, is to deſerve it. To his Juſtice and unſhaken Integrity, and the univerſal Suffrages of Praiſe of a whole [t] Nation for ſuch a Behaviour, we may poſſibly, in a great Meaſure, be indebted for ſuch a Series of great Men ſince his Time, in the Profeſſion of the Law, not be equalled in any former Period of Hiſtory, and not likely to be exceeded in any future.

Great and good Men, who dare do Right, without Regard to the Strength of Oppoſition, or the Clamours of a Multitude, are not only a Bleſſing to the Age in which they live, but even to ſucceeding Generations alſo, by the Influence which their glorious Conduct has in exciting Poſterity to imitate their Virtues.

[s] *Burnet*'s Hiſt. of his own Times, 2 Vol. P. 543.

[t] Nothing gave a more general Satisfaction than the naming Sir *John Holt* Lord Chief Juſtice. This Nomination was generally well received over the Nation. *Burnet*, *Boyer*, *Tindal*.

Hear the Sentiments of the celebrated *Addiſon* on this Subject.

"There is no Virtue (ſays [a] he) ſo truly great and God-like as Juſtice; moſt of the other Virtues are the Virtues of created Beings, or accommodated to our Nature as we are Men. Juſtice is that which is practiſed by God himſelf, and to be practiſed in its Perfection by none but him. Omniſcience and Omnipotence are requiſite for the full Exertion of it. The one, to diſcover every Degree of Uprightneſs or Iniquity in Thoughts, Words, and Actions. The other, to meaſure out and impart ſuitable Rewards and Puniſhments.

As to be perfectly Juſt is an Attribute in the divine Nature, to be ſo to the utmoſt of our Abilities, is the Glory of a Man. Such an one who has the public Adminiſtration in his Hands, acts like the Repreſentative of his Maker, in recompencing the virtuous, and puniſhing the Offenders. By the extirpating of a Criminal, he averts the Judgments of Heaven, when ready to fall upon an impious People; or, as my Friend *Cato* expreſſes it, much better in a Sentiment conformable to his Character.

When by juſt Vengeance impious Mortals periſh,
The Gods behold their Puniſhment with Pleaſure,
And lay th' uplifted Thunder-bolt aſide.

When

[a] *Guardian*, No. 99.

When a Nation once loſes its Regard to Juſtice; when they do not look upon it as ſomething venerable, holy, and inviolable; when any of them dare preſume to leſſen, affront, or terrify thoſe who have the Diſtribution of it in their Hands; when a Judge is capable of being influenced by any Thing but Law, or a Cauſe may be recommended by any Thing that is foreign to its own Merits, we may venture to pronounce that ſuch a Nation is haſtening to its Ruin.

For this Reaſon, the beſt [v] Law that ever paſſed in our Days (ſays *Addiſon*) is that which continues the Judges in their Poſts during their good Behaviour, without leaving them to the Mercy of ſuch, who, in ill Times might, by an undue Influence over them, trouble and pervert the Courſe of Juſtice.

Able and upright Judges are to be reckoned among the greateſt national Bleſſings, and ſhould have that Honor paid them whilſt they are yet living, which will not fail to crown their Memory when dead.

I always rejoice (ſays he) when I ſee a Tribunal filled with a Man of an upright and inflexible Temper, who in the Execution of his Country's Laws can overcome all private Fear, Reſentment, Solicitation, and even Pity itſelf. Whatever Paſſion enters into a Sentence or Deciſion, ſo far will there be in it a Tincture of Injuſtice. In ſhort, Juſtice diſcards Party, Friendſhip, Kindred, and is therefore always repreſented as blind, that we may

[v] Stat. 12 & 13 *Will.* 3. Chap. 2.

may ſuppoſe her Thoughts are wholly intent on the Equity of a Cauſe, without being diverted or prejudiced by Objects foreign to it."

If the Act which continued the Judges in their Poſts during their good Behaviour, was deemed by that diſcerning and judicious Writer *Addiſon*, the beſt Law that ever paſſed in his Days, how ought we to eſteem that [x] which ſecures our Judges in the Enjoyment of their Offices, during their good Behaviour, *notwithſtanding the Demiſe of the Crown*, and which eſtabliſhes their Salaries during the Continuance of their Commiſſions, but more eſpecially, his Majeſty's moſt gracious [y] Speech to his Parliament on that great Occaſion, wherein he was pleaſed to declare, that he looked upon the Independency and Uprightneſs of Judges as eſſential to the impartial Adminiſtration of Juſtice, as one of the beſt Securities to the Rights and Liberties of his loving Subjects, and as moſt conducive to the Honor of his Crown: Can we, as a grateful and loyal People, ſufficiently admire or revere his Majeſty for theſe his convincing Proofs of a noble and determined Reſolution to preſerve the Conſtitution, and the Rights and Liberties of the People inviolate? Can we, as Subjects, be inſenſible of the Bleſſings we enjoy when we reflect on his Majeſty's Goodneſs, in having vouchſafed to appoint Perſons of the greateſt Integrity and Abilities, to adminiſter Juſtice in the ſeveral Courts of Judicature of this Kingdom,

[x] Stat. 1 *Geo.* 3. Chap. 23.
[y] On *Tueſday*, 3d *March*, 1761.

dom, Perſons ſeduouſly careful of the Rights and Liberties of the People, and who would not, on any Conſideration, either by Hope or Fear, Rewards or Threats, be induced to act contrary to what is Right? How ſincere then muſt be the Satisfaction of every Individual, if he does but conſider for a Moment, that by this happy Means his Life, his Liberty, his Property, his Reputation, and every Thing in the leaſt dear and valuable, is fully and effectually ſecured from all Injury.

During the Time Lord Chief Juſtice *Holt* preſided in Court, ſeveral Caſes of the utmoſt Importance, and highly affecting the [z] Lives, [a] Rights, [b] Liberties, and [c] Properties of the People came in Judgment before him. There was a remarkable Clearneſs and Perſpicuity of Ideas in his Lordſhip's Definitions; a diſtinct Arraingement of them in the Analyſis of his Arguments; and the real and natural Difference of Things was made moſt perceptible and obvious, when he diſtinguiſhed between Matters which bore an untrue Reſemblance to each other. Having thus rightly formed his Premiſſes, he ſcarce ever erred in his Concluſions; his Arguments were inſtructive and convincing, and his Integrity would not ſuffer him to deviate from Judgment and Truth in Compliance to his Prince, or as obſerved before, to either Houſe of Parliament: And they all paid that

[z] *Plummer*'s Caſe, P. 47, 48. *Mawgridge*'s Caſe, P. 95.
[a] *Aſhby* and *White*, P. 74.
[b] The Queen againſt *Paty*, P. 90.
[c] *Coggs* and *Barnard*, P. 60.

that Regard to Juſtice in the Perſon of Lord *Holt*, as not to be offended at his Deciſions; ſeveral of which ſeemed to croſs their own Intereſts or Determinations. There is an Inſtance of each Sort in the following Pages, *viz.* Lord *Banbury*'s Caſe, and the Queen againſt *Paty*.

That his Lordſhip's Arguments therefore are well worth the Peruſal of every *Engliſhman*, need not, we preſume, be much inſiſted on at this Time of Day, eſpecially as moſt of them are now ſo faithfully and judiciouſly reported by that eminent Lawyer, the Lord Chief Juſtice *Raymond*.

The Reader will find the following moſt remarkable ones (for all would fill Volumes of themſelves) inſerted at large in the enſuing Sheets, *viz.*

1. Lord *Banbury*'s Caſe, P. 8.
2. The Banker's Caſe, P. 20.
3. *Lane* againſt *Cotton*, P. 37.
4. The King againſt *Plummer*, P. 47, 48.
5. His Lordſhip's Speech to *Boucher*, P. 58.
6. *Coggs* againſt *Barnard*, P. 60.
7. *Aſhby* againſt *White*, P. 74.
8. The Queen againſt *Paty*, P. 90.
9. The Queen againſt *Mawgridge*, P. 95.

After what has been ſaid of the Character of Lord Chief Juſtice *Holt*, and of the Authority of his Lordſhip's Arguments, it will, we preſume,

ſume, be needleſs to apologize for inſerting the Points of Law reſolved by him, upon Evidence in Trials, at *Niſi Prius*, or the Table of References to his Arguments and Reſolutions.

As his Lordſhip's Family is but little known to the World in general, for the Satisfaction of the Public, an Abſtract of his Will, Codicils, *&c.* extracted from the Regiſtry of the Prerogative Court of *Canterbury*, is ſubjoined. It is obſervable, that not a Syllable concerning this conſummate Judge, or any of his Family, is to be found, either in the ten Volumes, folio, of the General Dictionary; the five of the *Biographia Britannica*; or, the eleven large octavo of the *Biographical Dictionary*.

Trinity Vacation,
1763.

J. R.

THE LIFE and CHARACTER OF Sir *JOHN HOLT*, Knight, LATE Lord Chief Juſtice of the *King's-Bench*.

THE Right Honourable Sir *John Holt*, Knt. Lord Chief Juſtice of the Court of *King's-Bench*, in the Reign of their late Majeſties King *William* and Queen *Mary*, moſt eminent for his Abilities, Integrity, and Courage, in the Execution of his high and important Office, at a Time when his Prince and Country ſtood much in Need of an able and upright Judge, was the eldeſt Son of Sir *Thomas Holt*, Knight,[a] Serjeant at Law in King *Charles* the Second's Reign, by *Suſan* his Wife, Daugh-

B

[a] Sir *Tho. Raym.* Rep. P. 238. *Dugdale's Chronica Series.* P. 121. *Chronica Juridicialia.* P. 205. He received his Writ on the 16th Day of *October*, 1677, 29 *Char.* 2. It may not ſeem totally foreign to our Subject to inſert in this Place the Serjeant's Writ and Oath, the Writ is as follows,

"*Charles* the ſecond, by the Grace of God, of *England*, *Scotland*, *France*, and *Ireland*, King, Defender of the Faith, &c." [which means, (ſays the learned Doctor *Burn*) "*and of the Church* "*of* England, *and alſo of* Ireland *in Earth, the ſupreme Head*," *Burn*'s Eccleſiaſtical Law, 2 Vol. P. 172, 354. Stat. 35 *Hen.* 8. Chap. 3.] To our beloved and faithful *Thomas Holt*, Eſq; *Greeting*, Inaſmuch as We have, with the Advice of our Council, ordained, That you ſhall take upon you the State and Degree of a Serjeant at Law, from the Day of St. *Michael*, in three Weeks,

We

Daughter of *John Peacock*, of *Chawley*, near *Comnore*, in the County of *Berks*; he was [b] born in the Year 1642, 17 *Char.* 1. in a Market-town called *Thame* in *Oxfordſhire*, and educated in *Abingdon* School, while his Father was Recorder of that Town. He became a Gentleman Commoner of [c] *Oriel* College, *Oxford*, under the Tuition of Mr. *Francis Barry*. In the Year 1658, 10 *Char.* 2. he entered himſelf of [d] *Gray's-Inn* before he took a Degree, ſometime after which he was called to the Bar, where applying himſelf with great Induſtry to the Study of the Common Law, he arrived at ſo great Knowledge therein, that he ſoon became a very eminent Barriſter, inſomuch, that when the Earl of *Danby* (great Grandfather to his preſent Grace the Duke of *Leeds*) was, in the Year 1678, 30 *Char.* 2. im-

We Command, and firmly injoin you to ſettle and prepare yourſelf for taking upon you the aforeſaid State and Degree, in Form aforeſaid, and this you are in no wiſe to omit, under the Penalty of 1000*l.* Witneſs Myſelf at *Weſtminſter*, the *third* Day of *July*, in the *twenty-ninth* Year of our Reign.

The Label was indorſed, "To our beloved and faithful *Thomas* "*Holt*, Eſq; to take the State and Degree of a Serjeant at Law, "returnable in three Weeks of St. *Michael*." *Barker.*

Sir *Tho. Raym.* Rep. P. 238.

The Serjeant's Oath is,

"That you ſhall ſwear, that well and truely you ſhall ſerve the King's People as one of the Serjeants at Law, and you ſhall truely counſel them that you ſhall be retained with, after your Cunning, and you ſhall not differ, tract, or delay their Cauſes willing for Love of Money, or covetous of any Thing that may turn to your Profit; and you ſhall give Attendance accordingly, as God you help, by the Contents of this Book." *Show.* Rep. 2 Vol. P. 102, 103.

Note; the Motto to his Serjeant's Ring was *Gratiâ Regis, non Operibus Legis*; intimating, That his Preferment was owing to the *King*'s Favor, not to *his* Merit. *Freem.* Rep. P. 233. Sir *Tho. Raym.* Rep. P. 238.

[b] *Wood's Athenæ Oxonienſes*, Vol. 2. Column 964.

[c] *Wood* as above.

[d] Lord *Raym.* Rep. P. 604. Mod. Rep. 3 Vol. P. 100.

impeached in Parliament by the Commons, the Lords appointed Serjeant *Raymond*, (Father of that eminent Lawyer, the late Lord Chief Juſtice *Raymond*), Mr. *Saunders*, afterwards Chief Juſtice of the [e] *King's Bench*, and Mr. *Holt*, to be of his Council; but the [f] Commons, by a Vote, which was poſted round *Weſtminſter-Hall*, and the Parliament-Houſe, prohibited the ſame upon the ſevereſt Penalties.

On the 13th Day of *February*, 1685, 2 *James* II. he was made [g] Recorder of *London*, by Letters Patent, by [h] Commiſſion, in the Place of Sir *Thomas Jenner*, made one of the Barons of the [i] *Exchequer*, in the Room of Sir *Edward Neville*, and a [k] Knight by the Favor of King *James* the *ſecond*.

Having diſcharged the Office of Recorder with much Candor and Applauſe for about a Year and an half, he was removed thence, becauſe he would not give his Hand towards the taking away the Teſt, but [m] another gives us this Account of it, " and though King *James* the *ſecond* had no other Wars, but againſt the Laws and Conſtitutions of the Nation, yet he would have the Act [n] which makes it Felony without Benefit of Clergy, for any Soldier taking Pay in the

[e] *Show.* Rep. Vol. 2. P. 252. pl. 260. Sir *Tho. Raym.* Rep. P. 478. *Forteſc.* Rep. P. 383.

[f] *Boyer's* Annual Liſt of the Deaths of eminent Perſons, at the End of his Hiſtory of Queen *Anne*, P. 52.

[g] *Wood's Athen. Oxon.* Vol. 2. Col. 964. *Show.* Rep. Vol. 2. P. 466.

[h] *Maitland's* Hiſtory of *London*, Vol. 2. P. 1206.

[i] *Show.* Rep. Vol. 2. P. 466.

[k] *Wood's Athen. Oxon.* Vol. 2. Col. 964.

[l] *Wood*, Ibid.

[m] *Coke's* Detection of the Court, and State of *England*, Vol. 2. Lib. 5. P. 455.

[n] 2 & 3 *Edw.* 6. Chap. 2. Sect. 6. which is repealed as to the Felony, by Stat. 1 *Mar.* Seſſ. 1. Chap. 1. and revived by Stat. 4 & 5 *Phil.* & *Mar.* Chap. 3. Sect. 9.

King's Service, in his Wars beyond Sea, and upon Sea, or in *Scotland*, to desert his Officer, to extend to this Army, thus raised by King *James* the *second*, in Time of Peace, to inslave the Nation, in the Year 1687, 4 *Jam.* 2. (or about the latter End of the Year 1686,) and because the Recorder of *London*, Sir *John Holt*, would not expound this Law to the King's Design, he was put out of his Place, and so was Sir *Edward* [o] *Herbert* from being Chief Justice of the *King's Bench*, to make Room for Sir *Robert* [p] *Wright* to hang a poor Soldier upon this Statute, and afterwards this Statute did the Work without any further Dispute. On the *twenty-second* Day of *April*, in the Year 1086, 3 *Jam.* 2. or thereabouts, he was called to the Degree of a Serjeant [q] at Law with many others."

[r] Being chosen a Member in the Convention Parliament, called by the Prince of *Orange*, to settle the Nation, upon King *James* his withdrawing into *France*, in the Year 1688, 5 *Jam.* 2. he was appointed to be one of the Managers for the Commons, at the Conferences held with those of the Lords, about the ABDICATION, and the VACANCY of the Throne; he had an Opportunity to shew his great Abilities and Inclinations upon that solemn Occasion; and it is not at all un-

[o] Mod. Rep. 3 Vol. P. 125. *Show.* Rep. Vol. 2. P. 511. pl. 475. *Wood*'s Athen. Oxon. 2 Vol. Col. 992. When King *James* asked him to vote for the Repeal of the Test, he answered, he could not do it in Honor or Conscience; the King said, he knew he was a Man of Honor, but the Rest of his Life did not look like a Man, that had great Regard for Conscience; (for he was indeed abandoned to Luxury and Vice); he boldly replied, he had his Faults, but they were such that other People, who talked more of Conscience, were guilty of the like. *Tindal*'s Continuation of *Rapin*'s History of *England*, 3 Vol. P. 41. in Notes.

[p] *Show.* Rep. 2 Vol. P. 511. pl. 475. Mod. Rep. 3 Vol. P. 125.

[q] Mod. Rep. 3 Vol. P. 100. The Motto of his Ring was, *Deus, Rex, Lex.*

[r] *Boyer*'s Remarkables of the Year, 1710, P 407.

unlikely, but that it forwarded his Advancement: For the Government being ſettled, and King *William* and Queen *Mary* fixed upon the Throne, Sir *John Holt* was on the *fourth* Day of *May*, in the Year 1689, 1 *Will.* & *Mar.* made Lord Chief Juſtice of the Court of [s] *King's Bench*; Sir *William* [t] *Dolben*, Sir *William* [u] *Gregory*, and *Gyles* [w] *Eyres*, Eſq; being the other three Judges ſo conſtituted at the ſame Time, as well as thoſe of the [w] *Common Pleas*, and [x] Barons of the *Exchequer*. On *Tueſday* the *ſeventh* Day of the ſame Month of *May*, he was at a Meeting of the Governors of the *Charter-Houſe*, at *Whitehall*, choſen [y] one in the Place of Lord Chancellor *Jeffreys*, and ſome Time afterwards, *viz.* on the *twenty-fifth* Day of [z] *Auguſt*, in the ſame Year

 1689,

[s] Lord *Raym.* Rep. 2 Vol. P. 1309. Appendix to *Chronica Juridicialia*. P. 3. *Wood's Athen. Oxon.* 2 Vol. Col. 964. Biſhop *Burnet* ſays, "That though he was a young Man for ſo high a Poſt, yet he maintained it all his Time, with an high Reputation for Capacity, Integrity, Courage, and great Diſpatch; ſo that ſince the Lord Chief Juſtice *Hale*, his Time, that Bench had not been ſo well filled, as it was by him." *Burnet*'s Hiſtory of his own Times, 2 Vol. P. 5.

[t] Appointed, 20th of *April*, 1689. Appendix to *Chronica Juridicialia*. P. 3.

[u] Appointed, 8th of *May*, 1689. Appendix to *Chronica Juridicialia*. P. 3.

[w] *Viz.* Sir *Henry Pollexfen*, appointed Chief Juſtice the 6th of *May*, Sir *John Powell*, Sir *Thomas Rokeſby*, 8th of *May*, *Peyton Ventris*, Eſq; 9th of *May*, 1689. Appendix to *Chronica Juridicialia*. P. 3.

[x] Sir *Robert Atkins*, appointed Lord Chief Baron, 17th of *April*, Sir *Edward Neville*, *Nicholas Lechmere*, 8th of *May*, and Sir *John Turton*, 9th of *May*, 1689. Appendix to *Chron. Juridicial.* P. 3. *Tind.* Contin. *Rap.* Hiſtory of *England*, 1 Vol. P. 41. in Notes.

[y] *Clarendon*'s State Letters, 2 Vol. P. 186, publiſhed by *Richard Powney*, Eſq; in the Year 1763.

[z] *Boyer*'s Remarkables of the Year 1710, P. 408. Mr. *Wood* ſays, it was on the 26th Day of *September*, in the Year 1682. *Wood*'s *Athen. Oxon.* 2 Vol. Col. 964.

1689, he was admitted into his Majesty's most honourable [a] Privy Council, and sworn at [b] *Hampton-Court*.

[c] The Reversion of the Place of Chief Clerk [d] for inrolling Pleas in the Court of *King's Bench*, having been granted by King *Charles* the *second*, to his Majesty's natural Son the Duke of *Grafton*; and the same becoming vacant after the Duke's Decease, in Sir *John Holt*'s Time, there was a Contest [e] at Law between him and the young Duke of *Grafton* about the Disposal of it: But the Matter was at Length accommodated by the Interposition of the King himself; who, though my Lord Chief Justice might have, and had the Right, engaged his Lordship to make an handsome Allowance out of the Profits to an Orphan who had lost his Father in the public Service of his Country. My Lord gave the Place to his Brother Mr. *Rowland Holt*, who enjoyed it to the Time of his Death.

On the *twentieth* Day of *June*, in *Trinity* Term, 1694, 6 *Will.* & *Mar.* Lord Chief Justice *Holt* delivered his most excellent [f] Argument, in Lord *Banbury*'s Case. The Case was, that an [g] Indictment had been found at *Hicks's-Hall* against the Defendant Lord

[a] *Wood* as above. *Boyer*'s History of Queen *Anne*, P. 355. His Remarkables of the Year 1710, P. 408. *Tindal*'s Continuation of *Rapin*'s History of *England*, 4 Vol. P. 105.

[b] *Wood* as above.

[c] *Boyer*'s Remarkables of the Year 1710, P. 409.

[d] *Stow*. Parl. Cas. P. 111.

[f] Lord *Raym*. Rep. 1 Vol. P. 11. Mr. Serjeant *Skinner* says, that the Argument of *Holt*, Chief Justice, was more explicit than that of the other Judges, and delivered with greater Reason, Courage, and Authority. *Skin*. Rep. P. 517, 518.

[g] Lord *Raym*. Rep. 1 Vol. P. 10. *Salk*. Rep. 2 Vol. P. 510. *Carth*. Rep. P. 297. *Salk*. Rep. 3 Vol. P. 242. pl. 1. Cases *Tempore*, *Holt*, Ch. Just. P. 530. *Comb*. Rep. P. 273. *Skin*. Rep. P. 517. Mod. Rep. 12 Vol. P. 59. Lord *Raym*. Rep. 2 Vol. P. 1115.

Lord *Banbury*, by the Name of *Charles Knollys*, Esq; for the Murder of Captain *Lawson*, (who had married the Sister of the Defendant) and this Indictment was removed by *Certiorari* into the *King's-Bench*, where the Defendant pleaded a *Misnomer* in Abatement, *viz.* that *William Knollys*, Viscount *Wallingford*, by Letters Patent under the Great Seal of *England*, (which he produceth in Court) bearing Date the *eighteenth* Day of *August*, 2 *Car.* I. was created Earl of *Banbury*, to have and to hold the Dignity to him and the Heirs Male of his Body lawfully begotten, *&c.* that *William* had Issue *Nicholas*, who succeeded *William* in the Dignity, from whom the Dignity descended upon the Defendant as Son and Heir to *Nicholas*, *et hoc paratus est verificare*, &c. The Attorney General replies to this Plea, that the Defendant upon the *Thirteenth* of *December*, 4th *William* and *Mary*, preferred a Petition to the House of Peers then in Parliament assembled, that he might be tried by his Peers, and that after long Considerations and Debates, the House of Peers dismissed his Petition, *secundum Legem Parliamenti*, and disallowed his Peerage, and made an Order, that the Defendant should be tried by the Course of the Common Law, *&c.* To this Replication the Defendant demurred, and the Attorney General joined in Demurrer.

The Case was argued several Times at the Bar by Sir [h] *Edward Ward*, Attorney General, Sir [i] *Thomas Trevor*, Solicitor General, Sir [k] *William Williams*, King's

[h] Afterwards Lord Chief Baron in the Room of Sir *Edward Atkins*. Lord *Raym.* Rep. 1 Vol. P. 57. Append. to *Chron. Juridicial.* P. 5.

[i] Afterwards Chief Justice of the *Common Pleas*, Mod. Rep. 12 Vol. P. 477. Lord *Raym.* 2 Vol. P. 748. Append. to *Chron. Juridicialia.* P. 7.

[k] Afterwards Solicitor General to *James* the *second*, Mod. Rep. 3 Vol. P. 143.

Council, for the King and Queen; and by Serjeant [l] *Pemberton*, Serjeant [m] *Levinz*, and Sir *Bartholomew Shower*, for the Defendant.

On the ſaid *twentieth* Day of *June*, the Court of *King's-Bench* unanimouſly gave their Opinions for the Defendant, but becauſe the Reaſons of Sir *Samuel Eyre*, Sir *Giles Eyre*, and Sir *William Gregory*, Juſtices, were comprehended in the Argument of my Lord Chief Juſtice *Holt*, they are omitted here, to avoid Repetition.

He ſaid at the Beginning, that ſince this Caſe was of ſo great Importance, that in ſome Manner all the Nobility of *England* had ſome Concern in it, and ſince this Caſe had given Occaſion to many Debates in the Houſe of Lords, and ſince there were many Perſons of great Quality, who had made Reflections upon the Judges of the *King's-Bench*, for not having, before this Time, brought the Defendant to his Trial; he hoped that the Audience would give him their Pardon, if he examined the Queſtions hereafter ariſing a little at large.

In this Caſe (he ſaid) two Queſtions would ariſe:

1. If the Plea be good?

2. Suppoſing it to be ſo, if the Replication confeſſes and avoids the Plea?

To

[l] Afterwards Chief Juſtice of the *King's-Bench* to *Charles* the *ſecond*, in the Room of Sir *William Scroggs*, who was diſplaced. *Show.* Rep. 2 Vol. P. 155. *Ventr.* Rep. P. 354. Sir *Tho. Jones*'s Rep. P. 141. Note, he was afterwards at his own Deſire, made Ch. Juſt. of the *Common Pleas*. Sir *Tho. Raym.* Rep. P. 478, in the Place of Lord *North*, who was appointed Lord Keeper in the Room of Lord *Nottingham*, Lord High Chancellor, deceaſed. Sir *Tho. Jones*'s Rep. P. 231. *Show.* Rep. 2 Vol. P. 252. pl. 260. Sir *Tho. Raym.* Rep. P. 478.

[m] Afterwards one of the Juſtices of the *Common Pleas*, to *James* the *ſecond*, *Chron. Juridicialia*. P. 209. Note, he was afterwards removed, *Lev.* Rep. 3 Vol. P. 257, and came to the Bar again, *Show.* Rep. 2 Vol. P. 471. pl. 437.

To the Plea (he ſaid) the Council for the King had taken three Exceptions.

1. That it does not appear that *Banbury* is in *England.*

2. That Mr. *Knollys* ought to have averred, that he is *unus Parium Regni Angliæ*, for it may be that he is an Earl of *Ireland*, or of *Scotland*, and then he has not any Title to be tried by the Lords in this Realm.

3. That he ought to have concluded his Plea with *prout patet per Recordum*, or ought to have produced a Writ to certify that he was Earl of *Banbury*. Baron or not Baron being triable by Record.

To give Anſwers to theſe Objections more effectually, he thought it much to the Purpoſe to conſider, what an Earldom was originally; and he ſaid, that an Earldom conſiſted in three Things heretofore.

1. In Dignity.

2. In Office.

3. In diverſe Poſſeſſions.

As to the firſt, before the Time of *Edward* the *third*, there were but two Titles of Nobility, *viz.* Earls and Barons, Barons were originally created by Tenure, afterwards by Writ; and laſtly, *Richard* the *ſecond*, in the *eleventh* Year of his Reign, by Letters Patent under his Great Seal, created *John Beaucham* of *Holt*, Baron of *Kidderminſter*, and left a Precedent, which all his Succeſſors have followed down to this Time, but Earls were always created by Letters Patent. The Empreſs *Maud*, created *Milo* of *Glouceſter*, Earl of *Hereford*, by her Letters Patent.

As to the ſecond, an Earldom conſiſted in Office, for the Defence of the King and Realm. Earls (*Comites*) had not their Denomination from the County, but a *comitando Regem.* And becauſe it is an Office, it may be intailed within *Weſtm.* 2 Cap. 1. and although the Statute 26 *Hen.* 8. Cap. 13. had never been enacted,

an

an Earldom had been ſubject to Forfeiture by the committing of High Treaſon.

As to the third, an Earldom conſiſted in Rents, Poſſeſſions, *&c.* but in Proceſs of Time they decreaſed to 20*l.* *per Annum*, and nevertheleſs the Heir ſhould pay 100*l.* Relief within *Magna Charta*; but at this Day it conſiſts only in Dignity and Office, which extend over all the Land.

2. He conſidered, that the great Seal of *England* is appropriated to this Realm, and that which is done under it ought to bear Relation to *England*, and to no other Place. If the King of *England*, before the Conqueſt of *Ireland*, had, by Letters Patent, conferred a Title of Honour, the Patentee ſhould have been an *Engliſh* Peer. It is true that the King may create an *Iriſh* Earl under the *Engliſh* Great Seal. But then there ought to be expreſs Words; for where, by the Prerogative, a ſpecial Act is done, there ought to be expreſs Words, and it ſhall not be taken by Implication. And farther, an Act of Parliament ſhall not extend to *Ireland*, unleſs it be particularly named; and therefore, to intend the Defendant in this Caſe, to be an *Iriſh* Peer, is foreign, and ought to be rejected.

3. He was of Opinion, that the Place from whence the Patentee takes his Title, is not neceſſarily to be in *England*; nor in Reality is there any Neceſſity, that there be any Place. *Albemarle* is not within *England*, and nevertheleſs, at the Time of the making *Magna Charta*, there was an Earl of that Title, and there have been Dukes who have borne that Title very lately. A Man was an Earl, and he had no County. He ſaid, that he had often made Inquiry, if there were any ſuch Place as *Rivers*, but he had never been able to find ſuch Place, only that it was the Name of the Earls of *Devonſhire* in the Time of King *Stephen*. Here is then a ſufficient Anſwer to the firſt Objection to the Plea;

for

for if in the Creation of an Earl, the Place is not neceſſary (as by what he had been ſaying, it is apparent that it is not) it was not neceſſary nor material, to make an Averment, that *Banbury* is within *England*; but the Defendant being Heir to *William* who was created Earl of *Banbury*, under the Great Seal of *England*, ſhall be an *Engliſh* Peer.

As to the ſecond Objection to the Plea, that the Defendant ought to have averred, that he is *unus parium regni Angliæ*, he anſwered, that what is apparent has no need to be averred, that he is an Earl, appears by the Letters Patent which he hath produced, and then, that he muſt be of *England*, is ſufficiently demonſtrated by what goes before. Beſides that, he does not plead this Plea here, to make a Right or Title to the Earldom of *Banbury*, but only by Way of *Miſnomer* in Abatement of the Indictment; and that *Miſnomer* is a good Plea. See 2 *Inſt.* 595. if a Knight be indicted by the Name of Eſquire, the Indictment ſhall abate.

The third Objection to the Plea was, that the Defendant ought to have concluded his Plea with *prout patet per Recordum*, Baron or not Baron being triable by Record. Or *ſecondly*, he ought to have produced a Writ out of *Chancery*, to certify the Deſcents, and that he is Earl of *Banbury*.

As to the firſt Part of this Objection, he confeſſed, that if the Peerage of the Defendant had been created by Writ, it had then been triable only by Record, and it had been a fatal Exception; but Letters Patent may be pleaded and ſhewn to the Court (as in this Caſe is done) and they cannot be queſtioned, but by pleading *non conceſſit*; and therefore in this Caſe there cannot be any ſuch Iſſue as Baron or not Baron; moreover there being Deſcents here, which are mere Matters of Fact, and triable only by the Country, ſuch Con-

Concluſion had been ill; becauſe it cannot appear by the Record, if *Nicolas* was the Son of *William*, or *Charles* the Son of *Nicolas*, and the Books of 22 *Aſſis*. 24. *Bro. Aſſis*. 240. ought to be underſtood of Peerage created by Writ, for there was no Baron created by Letters Patent until the *eleventh* Year of King *Richard* 2. there is alſo Nobility gained by Marriage, and this is triable by Jury.

And as to the ſecond Part of this Objection, that the Defendant ought to have produced a Writ out of *Chancery*, *&c.* he anſwered, that theſe are only cautionary Writs, and Writs of Privilege, and were not of Neceſſity but for Expedition. And ſuppoſing that the Defendant might have had one, yet it is no Conſequence, that the Omiſſion of it ſhall be a Determination of his Peerage. And further, in all the Precedents cited on the other Side, there were no Letters Patent pleaded (as in our Caſe) ſo that it could not appear to the Court, without ſuch Writ, that the Party was a Peer. So that he was of Opinion (and all his Brothers agreed with him in all theſe Points) that the Plea was very good.

The Queſtion then will be, If the Replication confeſſes and avoids the Plea? Which is in Effect, if the Defendant be concluded from his Peerage by this Order of the Houſe of Lords: And he was of Opinion, that he was not, for four Reaſons.

1. Becauſe this Order was not a Judgment by Parliament.

2. Admit that it was a Judgment, yet of an original Cauſe, the Houſe of Lords has no Juriſdiction.

3. There was no Plea depending in the Houſe of Lords, concerning the Right of the Earldom of *Banbury*.

4. There is not here any Judgment to bar him of his Title.

As

As to the firſt he ſaid, that the Parliament conſiſted of the King, the Lords Spiritual and Temporal, and the Commons. The judicial Power is only in the Lords, but legally and virtually it is the Judgment of the King as well as of the Lords, and perhaps of the Commons too. Writs of Error to remove Records out of the *King's-Bench* into the Houſe of Lords run, *coram nobis in præſens Parliamentum*; but in this ſuppoſed Judgment the King is excluded. If one may give Credit to an old Advocate, *Fleta*, Cap. 17. he ſays, that all Matters of Authority and Juriſdiction are derived from the King.

The Houſe of Lords has a double Authority, as the Parliament, and the Courſe of the Houſe; between which we muſt diſtinguiſh by their Stile. And their Proceedings are of different Effects in Law; for Journals are not Records of Parliament, and therefore we cannot take Notice of them.

Judgments ought alſo to be given in their proper Stile; and therefore if the *King's-Bench*, which is held *coram Rege*, enter Judgment by the Juſtices of the *King's-Bench*, it is void. But in the principal Caſe there is no mention made of the King; therefore this Judgment is not given in the proper Stile, as appears by what has deen ſaid before.

As to the ſecond he ſaid, that the Houſe of Lords has no Juriſdiction in an original Cauſe, becauſe that ſupreme Court is the laſt Reſort. Beſides, that for the moſt Part original Cauſes are mixed with Matter of Fact, and it is unworthy of ſo ſupreme a Court, to try Matters of Fact, for which Reaſon, Error of Fact in the *King's Bench*, muſt of Neceſſity be brought before the ſame Judges of the *King's-Bench*.

If the Parliament took Cognizance of original Cauſes, the Party would loſe his Appeal, which the Common Law indulgeth in all Caſes, for which Reaſon the Parliament

liament is kept for the laſt Reſort; and Cauſes come not there, until they have tried all Judicatories. Within theſe four Years Judgment was given againſt the Earl of *Macclesfield* in the *Exchequer*, he brought Error in the Houſe of Lords, and the Queſtion was, If by 31 *Edw.* 3. Stat. 1. Chap. 12. the *Exchequer* Chamber ought not to interpoſe, and adjudged that it ought, and the Writ abated. 4 *Inſt.* 21. The Caſe of the Biſhop of *Norwich*, to the ſame Purpoſe.

3. He was of Opinion, that this Dignity differed not from an original Eſtate at Common Law, for it was granted under the Great Seal of *England*, and therefore deſcendible according to the Courſe of the Common Law; and it was at Common Law, an Eſtate in Fee ſimple, but ſince *Weſtm.* 2 Cap. 2. it is an Eſtate tail. And if the Patentee be diſturbed of his Dignity, the regular Courſe is to petition the King, and the King indorſes it, and ſends it into the *Chancery*, or the Houſe of Peers. For the Lords have no Power to judge of Peerage, unleſs it be given to them by the King. For as no Peer can be created without the King's Conſent, who is the Fountain of Honour, no more can any be degraded withont his Conſent. And an Ordinance of the Houſe of Peers cannot confer Peerage.

The Houſe of Peers (he agreed) has Juriſdiction over its own Members, and is a ſupreme Court; but it is the Law which hath inveſted them with ſuch ample Authority, and therefore it is no Diminution to their Power, to ſay, that they ought to obſerve thoſe Limits which this Law hath preſcribed for them, which in other Reſpects hath made them ſo great.

The Precedents which Mr. Attorney General hath cited, are not to this Purpoſe. That of the Lords *Mountjoy*, *Bellafys*, and *Lovelace*, 1628, was Matter of Privilege. The Lord *Mountjoy* claimed Precedency

cy in the Houſe of Peers of the Lords *Lovelace* and *Bellaſys*, being created 5 *June*, 3 *Car.* 1. Baron of this Realm by Letters Patent, in which there was a Clauſe to precede the two other Lords, for which he petitioned the Houſe of Lords, but they would not allow it to him. For althdugh the King might give Precedency by the Common Law, nevertheleſs, in this Caſe, he was bound by the 31 *Hen.* 8. Cap. 10.

The Caſes of the Lords *Pembroke*, *Stamford*, and *Mohun*, were only Petitions by them for a Trial by their Peers. If a Peer commits Treaſon, *&c.* he ought to be tried by his Peers, and therefore it is decent to ſubmit his Trial to them, but he does not by that ſubmit his Title to his Peerage; beſides that, if the Peers make an Order that the Petitioner ſhall be tried by his Peers, and they make an Addreſs to the King to make an High Steward, the King may chuſe whether he will or no, notwithſtanding their Order and Addreſs.

The Caſe of the Lord *Preſton* is leſs to the Purpoſe, for his Patent was void, being made by King *James* the *Second*, after the Revolution.

The Caſe of *James Percy* was alſo a Caſe of Privilege.

So that there is no Precedent to warrant the Proceedings in this Caſe. Therefore he concluded this Point, that the Caſe coming before the Lords originally, all Proceedings were *coram non Judice*, for they have not Juriſdiction of an original Cauſe; but, as is before ſhewn, it might have been brought before the Lords regularly, and then their Determination had been final.

3. Concerning the Right of the Earldom of *Banbury*, there was no Plea depending before the Houſe of Lords; for the Defendant did not petition to enjoy the Earldom, but ſuppoſed himſelf in Poſſeſſion.

4. There is not here any Judgment to bar the Defendant of his Title to the Earldom; for no Court can give

give Judgment in a Cauſe not depending, or which comes not in a judicial Method before that Court; but here it is proved by what he had been ſaying, that the Title of the Earldom was not in Queſtion before the Peers. If Treſpaſs be brought for a Treſpaſs done in the Land belonging to an Houſe, and it appear at the Trial that the Plantiff hath no Title to the Houſe, yet the Court cannot give Judgment, to put the Party out of Poſſeſſion of the Houſe.

2. A Judgment ought to be complete and formal; therefore, if *quo Warranto* be brought for uſurping royal Franchiſes, the Court give their Opinion, that the Defendant hath no Title to them; unleſs they proceed and ſay, *ut abinde excludatur*, it avails nothing. In the ſame Manner, in the Caſe between *Level* and *Hall*, *Cro. Jac.* 284. where in Debt upon Bond, the Defendant pleaded acquittal by Verdict in another Action upon the ſame Bond, the Entry upon the Verdict was, that the Defendant ſhould recover Damages againſt the Plaintiff, *et quod eat inde ſine die*, and becauſe there was no Judgment *quod Querens nil capiat per Breve*, it was adjudged ill.

3. Diſmiſſion is no Judgment in Court of Law.

And as to the Objection, that the Judgment was ſaid to be given [n] *ſecundum Legem Parliamenti*, which the Defendant, by his Demurrer, hath confeſſed.

He

[n] Mr. *Skinner*, and Mr. *Comberbach*, both add, that his Lordſhip, as to this, ſaid, that he did not know any Reaſon for this Objection, which the King's Counſel had inſerted, if it was not to frighten the Judges: But he ſaid, that he did not regard it, for though he had all Reſpect and Deference for that honourable Body, yet he ſat there to adminiſter Juſtice according to the Law of the Land, and according to his Oath, and that he ought not to regard any Thing but the Diſcharge of his Duty. *Skin.* Rep. P. 526. *Comb.* Rep. P. 278.

He answered, 1. That a Demurrer confesses only Matter of Fact, and that only when it is well pleaded; but it never confesses Matter in Law.

2. *Lex Parliamenti* is to be regarded as the Law of the Realm; but supposing it to be a particular Law, yet if a Question arise determinable in the *King's-Bench*, the *King's-Bench* ought to determine it. The filing an Original against a Member of Parliament, was adjudged no Breach of Privilege. If a Man be committed by Parliament, and the Parliament is prorogued, the *King's-Bench* will grant an *Habeas Corpus*. The Common Law then does not take Notice of any such [o] Law of Parliament to determine Inheritance originally. If there is any such, it ought either to be by Act of Parliament, and there is no such Act; or it ought to be by Custom, and no more is there any such Custom. But if Inheritance shall be originally determinable in Parliament, where the Parliament, *viz.* the House of Peers hath no Jurisdiction, the Peers would have an uncontroulable Power, *et ubi jus est vagum, res est misera.* For which Reasons he was of Opinion, that Judgment ought to be given for the Defendant. And accordingly, with the Concurrence of all the other Judges, for the same Reasons the Indictment was abated.

[o] His Lordship said, as to the Law of Parliament, he did not know of any such Law, and every Law which binds the Subjects of this Realm, ought to be either the Common Law and Usage of the Realm, or an Act of Parliament; *nec super eum ibimus, nec super eum mittemus, nisi per legale Judicium Parium suorum, aut per Legem Terræ*; but if there were any such Law and Custom of Parliament [the which Mr. Attorney said was *inter Arcana Imperii*, which is a strange Notion of a Law, though it may be good in Politics; and for which the Lords would not thank him, when they considered that the Law which governs the Inheritance of their Dignities is *inter Arcana.*] *Skin.* Rep. P. 526. *Comb.* Rep. P. 278.

In [p] *Hilary* Term, 1697, 9 *Will.* 3. the Lord Chief Juſtice *Holt* was ſummoned to give his Reaſons of this Judgment to the Houſe of Peers, and a Committee was appointed to hear and report them to the Houſe, of which the Earl of *Rocheſter* was Chairman. But the Chief Juſtice *Holt* refuſed to give them in ſo extrajudicial a Manner. But he ſaid, that if the Record was removed before the Peers by Error, ſo that it came judicially before them, he would give his Reaſons very willingly; but if he gave them in this Caſe, it would be of very ill Conſequence to all Judges hereafter in all Caſes. At which Anſwer ſome Lords were ſo offended, that they would have committed the Chief Juſtice to the *Tower*. But notwithſtanding, all their Endeavours vaniſhed in Smoak.

Note; Mr. Serjeant [q] *Salkeld* tells us, that the Defendant, Lord *Banbury*, was not tried for this Murder at all.

This Proceeding of the Houſe of Peers did not in the leaſt intimidate the Chief Juſtice, as will appear from a very remarkable Inſtance which happened but a few Years afterwards: The Biſhop of St. *David's* moved in the *King's-Bench* for a Prohibition, which the Chief Juſtice denied, whereupon the Biſhop petitioned the Lord Chancellor *Somers*, to have a Writ of Error upon this Denial of the Prohibition; who having ſome Doubt, whether it would lie or not, referred it to the Attorney General; who certified his Opinion to be, that a Writ of Error would lie in this Caſe. Upon which the Suggeſtion was entered upon Record, and the Denial of the Prohibition; and the Writ of Error was granted, and the whole Record brought by the Chief Juſtice into Parliament, and afterwards

[p] Lord *Raym.* 1 Vol. P. 18.
[q] *Salk.* Rep. 2 Vol. P. 512.

terwards upon hearing of his Opinion, the Lords of Parliament were of Opinion, that a Writ of Error would not lie in this Caſe. However, *Holt, Chief Juſtice, told Lord Chief Juſtice* [t] Raymond, *that if the Lords had been of Opinion, that the Probibition ought to have been granted, he never would have granted it.*

It [u] is well known in what Manner King *Charles* the *ſecond* mortgaged the whole Revenue of the Crown to the Bankers for an immenſe Debt, and paid them Intereſt at the Rate of 8 *per Cent.* while thoſe, who intruſted the Bankers, received only 6 *per Cent.* In the Year 1672, the *Exchequer* Payments were ſtopped, and Multitudes ruined. About five Years after, his Majeſty granted his Letters Patent to all Perſons concerned for the annual Penſion of 6 *per Cent.* out of the Hereditary Exciſe, given by Parliament inſtead of the Wards and Liveries, 12 *Char.* 2. *Chap.* 24. and upon the principal Sums due to them, on delivering up their Securities, and accepting proportionable Aſſignments in Satisfaction of their Debts. The Payments were made regularly by Virtue of thoſe Letters Patent, down to *Lady-Day*, 1683, and then no more iſſued for the Remainder of King *Charles*'s Reign, the whole Reign of King *James* the *ſecond*, and for three Quarters of a Year from after the Revolution; whereupon in *Hilary*

C 2 Term,

[t] Lord *Raym.* 1 Vol. P. 545.

[u] *Tind.* Contin. *Rap.* Hiſt. *Engl.* 3 Vol. P. 403, in Notes.

[w] Lord *Somers*, his Argument on his giving Judgment in this Caſe, which he delivered in the *Exchequer* Chamber, *June* 23, 1696. P. 6. This Argument is much admired for the inimitable Elegance of the Stile and Method, and for its Comprehenſion and Learning. It may be added, that it is not only eſteemed one of the fineſt Performances in the Law, but has ſatisfied very able Lawyers of the Legality of his Judgment; ſo that the Publication of it did as much Juſtice to his Integrity, as Honor to his Parts. It is ſaid, that in the making of it, the Search of Records and Precedents coſt him ſeven hundred Pounds. *Tind.* Contin. *Rap.* Hiſt. *Engl.* 3 Vol. P. 405, in the Notes.

Term, 1 *W.* & *M.* 1689, a Petition was exhibited by *Joſeph Hornby*,[y] to the Treaſurers and Barons of the *Exchequer*, for the Allowance of the ſaid Letters Patent. The Attorney General demurred generally: The Court gave Judgment for the Petitioner *Hornby*, whereupon the Attorney General brought a Writ of Error in the *Exchequer-Chamber*, where Lord Chief Juſtice *Holt* delivered the following Argument in Affirmance of the Judgment, in *Trinity* Term, 1695, 1 *W.* 3.

In this Caſe,[z] here have been two Points made:

1. Whether this Grant be good?

2. Whether here be a proper Courſe taken by the Patentees?

There has indeed been a third Point ſtarted by my Lord Chief Juſtice *Treby*, and that does reſpect the entering of the Judgment.

As to the firſt Queſtion, I hold the Grant to be good, and all that have argued here, have concurred in the ſame Opinion. I do confeſs this is the great Point of the Caſe; but ſo much has been ſaid to it, that little more can be added: But I muſt ſay ſomething to it, though I cannot but repeat.

I hold that King *Charles* the *ſecond* might charge this Branch of his Revenue, and my Reaſon for my Opinion is but ſhort.

It is, becauſe the King was ſeized of an Eſtate in Fee of this Revenue; for to ſuch an Eſtate a Power of Alienation is incident. And I take it to be the Intent and the expreſs Words of the Act, That the King ſhould have a Right and Liberty of alienating and charging this Eſtate.

It is no Objection, that this Revenue was given to the King under a Truſt; for notwithſtanding that, he might

[y] Mod. Rep. 5 Vol. P. 29, 30.
[z] Mod. Rep. 5 Vol. P. 53.

might alien it: So ſeveral Kings of *England* have founded Corporations of charitable Uſes, and yet theſe Perſons incorporated might, notwithſtanding ſuch Truſt, alien their Eſtates; ſo may Dean and Chapter theirs; ſo may a Biſhop with the Conſent of Dean and Chapter; ſo a Parſon with the Conſent of the Patron and Ordinary, might have aliened the Land of which he was ſeized in the Right of his Church: But the King has Nobody required to conſent to his Alienations. To ſay, that he may alien by Conſent of the Eſtates of the Realm, is as much as to ſay, he cannot alien without an Act of Parliament, which he may clearly do.

And, indeed, this Revenue comes to the King by Purchaſe; for he gave a Recompence for it, *viz.* Part of his ſtanding Revenues, it being the Profits that did ariſe from his Wards and Liveries.

But it is objected, that this Power in the King of alienating his Revenues, may be a Prejudice to the People, to whom he muſt recur continually for Supplies. I anſwer, that the Law has not ſuch diſhonourable Thoughts of the King, as to imagine he will do any Thing amiſs to his People in thoſe Things in which he hath Power ſo to do.

But that which I inſiſt on is, that it is abſurd in its Nature to reſtrain the King from a Power of aliening his Revenues of which he is ſeized in Fee: It is againſt the Nature of the being of a King, that he ſhould have leſs Power than his People; for before he was King he had Power to alien. Now when the Crown deſcended upon him, he is ſeized *in jure Coronæ*, and ſhall he then have leſs Power over thoſe very Lands than he had before the Deſcent of the Crown? Shall he now be diſabled to alien by being a King? This would be againſt a common Principle of Law, that the Deſcent of the Crown takes away all Diſability.

Then it is repugnant to the Conſtitution of the Government, ſuppoſe a King ſhould be under a preſent Danger of being invaded, if the King could not raiſe Money by alienating his Revenue, the Nation might periſh; for he cannot otherwiſe raiſe Money than by an Act of Parliament, for which there might not be Time: And therefore heretofore the Kings of *England* have borrowed ſeveral Sums of Money by mortgaging their Lands.

And there ought to be a Power in all Governments to reward Perſons that deſerve well, for Rewards and Puniſhments are the Supports of all Governments; and it has been the conſtant Uſage of the Kings of *England* to reward Perſons deſerving of the Government out of the Crown Revenues, by Penſions, and giving Eſtates to ſupport the Titles of Earl and other Dignities. And this has been allowed of by Act of Parliament, as appeareth by 34 *Hen.* 8. c. 20.

But ſome perhaps will ſay, I have been talking little to the Purpoſe; for that they do not deny that the King might alien his own Demeſne, or any Lands that come to him by Deſcent or Purchaſe: But, ſay they, this Revenue was ſettled by Act of Parliament on the Crown, and therefore it cannot be alienated. But I do not find any ſuch Diſtinction in our Law-Books, nor any Authority from Common or Statute-Law, that reſtrains the Kings of *England* from alienating any Sort of their Revenues.

As for the Lands in *antient Demeſne*, they ſeemed moſt appropriated for the King's Uſe of any of his Revenues: For they had ſeveral Privileges all relating to the King, as not to be impleaded out of the Manor, to be free of Toll for all Things concerning their Suſtenance and Huſbandry, not to be impanelled on any Inqueſt; and yet, notwithſtanding all this, thoſe Lands were always alienable; and if theſe Lands are

alien-

alienable, what Eſtates in the Crown are not alienable? And our Books do take Notice that theſe Eſtates are alienable.

Then what Reaſon can be given why ſome Eſtates ſhould be aliened, and others not? Why may not the King as well alien theſe Eſtates as he may the Flowers of his Crown, as appears in the Abbot of *Strata Marcella*'s Caſe? For he may grant a County Palatine, which has *jura Regalia*; ſo he has granted a Power to pardon Treaſon or Felony, *&c.* and indeed theſe Prerogatives are reaſſumed to the Crown by the Statute *H.* 8. but the Grants were not void.

Then if an Eſtate be ſettled on a Subject by Act of Parliament, it will not be denied but that he may alien ſuch Eſtate; and why ſhall not the King have the ſame Privilege? It appears, in Fact, that he has always done it; ſo all the Lands that belonged to the Abbies and Monaſteries were aliened by the King, and yet they were given to him by Act of Parliament, and by general Words, as it is here: So the Cuſtoms have been always granted and charged by the King, and yet they were granted to him by Act of Parliament. The Authorities in our Books are full to this Purpoſe.

But it is objected, that this Revenue was given in lieu of Inheritances that were unalienable, *viz.* the Wards, Liveries, Purveyances, *&c.*

Though how the Nature of theſe Inheritances can effect Inheritances of another Nature I cannot ſee; but even theſe Inheritances were always in Effect alienable, for they might have been releaſed. The King's Grant to be free of Priſage, and ſo were Services *in Capite*, and Purveyances, *&c.*

Some Opinions have been urged, which ſay, that the Crown Revenues could not be aliened, as *Fleta* and *Bracton*; but theſe Books are only Ornaments to the

Law; they are not looked on as authentic, especially where the Practice has been always to the Contrary: But *Brit.* 87. is otherwise, and so is *Selden* 549 and 552. And *Bracton* himself, in his second Book, C. 57. seems to be of another Opinion, where he saith, that even *Res Sacræ* are alienable by the Common Law, though, perhaps, by the Canon Law they are not to be aliened. So the Statute of *Bigamis*, Cap. 7. also admits, that the King may grant away his Revenues; *Fortescue*, in his Book *de Laudibus Legum Angliæ*, that the Government is not only regal, but legal and political, and then discourses of the Particulars wherein the regal Power is restrained: And if our Constitution had been so that the King could not alien his Lands or Revenues, it cannot be imagined but that he would have mentioned a Thing so remarkable, especially in a Time when there were so many Grants made by the Crown, though, indeed, at that Time, there were many Acts of Resumption made, as there were before and after, as in 6 *Hen.* 4. 14. and in the Time of King *Henry* the *eighth*, *&c.* which are a great Demonstration that those Grants could not be revoked or avoided, but by Act of Parliament.

It is objected, that the Fee-Farm Rents, in the Time of King *Charles* the *second*, were granted by Act of Parliament; but they might have been granted without that Act; it was only made to encourage Purchasers, to make good the Letters Patents beyond all Scruple, and to give Power to sue for the Arrears of Rent, and to distrain, *&c.*

When it is objected, that if this Grant of the Revenue should be alienable to the Subjects, that then the King's Officers of Excise would be the Subject's Officers.

But that does not follow, they are only a Means to convey to their Fellow-Subjects their Right, and that which

which is granted to them by the King's Letters Patents. So the Juſtices in *Eyre*, and of *Oyer* and *Terminer*, *&c.* are the King's Juſtices; and yet they convey Juſtice to the People.

As for theſe Letters Patents themſelves, it is plain, by the whole Tenor of the Patents, that the King was not deceived in his Grant; and the Conſideration being executed, though it be falſe, yet that will not avoid the Grant.

So that I conclude this Point, that theſe Letters Patent which charge this Branch of the Revenue, are good and firm in Law.

I come now to the ſecond Point, and that is, concerning the Remedy taken by the Patentees.

And I hold they have taken a very proper and legal Remedy. We are all agreed that they have a Right; and if ſo, then they muſt have ſome Remedy to come at it too.

The Remedies, at Common Law, to recover againſt the King, were by Petition, or *Monſtrans de Droit*.

Indeed, there is a new Remedy now given by Stat. 2 *Edw.* 6. Cap. 8. and that is by Way of Traverſe to the King's Title.

But firſt, a Petition of Right is not neceſſary in this Caſe: Not but that a Man may proceed in this Way, and admit himſelf out of Poſſeſſion if he pleaſeth. But it is not neceſſary for two Reaſons:

1. Becauſe a Petition of Right is grounded always upon a naked Matter of Fact ſuggeſted, and not of Record; and upon ſuch a Suggeſtion, there is a Commiſſion iſſues out of *Chancery*.

But here the Title is derived by Letters Patents, which are of Record; ſo that here is no Matter of Fact to be enquired of.

2. The

2. The Patentees do not endeavour to destroy the King's Title: But Petitions of Right do so, and are generally inconsistent with the King's Title.

Then this Annuity is not turned to a Right, as if there had been an Attainder, &c. therefore why should there be a Petition of Right?

I take this Remedy to be by a [y] *Monstrans de Droit*; and this Remedy is to be sued at Common Law, when the Party's Title appeareth of Record. *Monstrans de Droit*, or *ouster le maine* (which is all one in Effect) always lies where the Title or Right of the King appears, as well by Matter of Record as the King's Title; and this appears fully. *Sadler*'s Case, 4 Rep. and *Hob.* 334.

Also, it is plain, that a *Monstrans de Droit* lies in the *Exchequer*: I think there is no doubt of that.

It is objected, that the Petition should be first sued to the King: But by the Records in *Ryly*'s *Placita*, Parl. 351, 257. *Staundf.* 72. it appears, that these Petitions of Right have been sued to the Court of *King's-Bench*. But, indeed, this Petition differs from those; for this being only the Way of Complaint, there needs no Indorsement as in the other Cases.

The next Objection is, that in this Precedent there was a *Liberate*.

1. This Writ is, in its Nature, a Writ of Allowance. But this Writ does not give any Manner of Jurisdiction; for the Court may hold Plea and proceed without it.

2. But the next Answer that I give to this, and which may be satisfactory to any Body, is the Statute of 5 *R.* 2. Cap. 9. which directs the Barons of the *Exchequer* to answer every Demand, without any Writ or Letter from the King; so is 4 *Inst.* 110. So that I

[y] See Lord Keeper *Sommers*, his Answer to this in his Argument, P. 72, &c.

I take it to be plain, that the Barons might proceed here without any Writ at all.

But it is objected, that the Writ ſhould have been directed to the Treaſurer, *&c.*

But this needs not be; for the Treaſurer hath nothing to do with Civil Pleas.

Indeed, *Fitz. N. B.* 129. doth mention the Treaſurer: But this is a common Error, and the Writs need not be ſo directed.

It is true, as my Lord *Coke* obſerves, that the Legitimation of any Caſe may be ſuſpected that has no Caſe of Kin to it; and I agree to that Rule: But I think I have found out ſome Kindred to this preſent Caſe, and that is the Caſe in *Coke*'s Entries. 93. Tit. "Claim of Liberties;" for there the Barons did allow certain Liberties, and alſo the Payment of a Rent-charge granted by the King to my Lord *Hunſdon*. So the Caſe of *Margery Parker*, in 9 *H.* 6. 13. is a conſiderable Authority to this Point; ſhe had an Annuity out of the *Magna Cuſtuma* of *London*, granted by the Queen, out of a Sum aſſigned for her Dower, to receive of the Cuſtomers, but muſt ſue to the Barons of the *Exchequer*; and *Margery Parker* may ſue for it in the *Exchequer*, in the ſame Manner as the Queen might for her Portion. Then there is my Lady [a] *Broughton*'s Caſe, which happened in 25 *Car.* 2. my Lady *Broughton* forfeited the Keeper's Place of the New Priſon to the King, who thereupon made a Seizure; upon this the Dean and Chapter of *Weſtminſter* came into the Court of *Exchequer* and claimed the Inheritance, and the King's Hands were amoved. Indeed, this Matter was firſt ſtirred in the *King's-Bench*, for they gave Judgment to ſeize the Priſon. Now if the Court of *King's-Bench* could hold Plea there, of a *monſtrans de droit*,

[a] See Lord Keeper *Somners*, his Argument, P. 67.
[b] Lord *Sommers*, his Argument, P. 70.

droit, becauſe the Seizure was there; why may they not as well proceed in the *Exchequer* by *monſtrans de droit*, becauſe the Money is there?

It is true, Money comes into and iſſues out of the *Exchequer*, without the Barons: But with Submiſſion, the Rights of bringing it in, and iſſuing out of the Money, belongs to the Barons, and if you make the Barons only Judges of the Right of coming in of the King's Money, you make them Judges but of half their Buſineſs which belongs to that Court; for the Barons have judicial Power over the whole Court of *Exchequer*. And to ſay that the Treaſurer and his Officers have no Correſpondence with the Barons, is not true; for all the Books take Notice of them, as Perſons that all belong to the *Exchequer*.

Some have objected, that this Court ought regularly to hold Pleas only where the King is Party; and that this Court uſed to be prohibited to proceed in any Pleas that do not concern the King. 2 *Inſt.* 551. there you may ſee what Pleas they may hold.

But here the Plea does not concern the King; for here is the King's Grant, and the Suit is to the King: And this Determination of the Barons in this Caſe, is not thus any Judgment of their own; but the King himſelf, by Reaſon of ſuch his Letters Patents, hath obliged himſelf to make ſuch Payments. As in the Caſe of an Obligation where Debt is brought upon it, and a Recovery is had; it is not ſo much the Judgment of the Court as binds the Property, as the Obligor himſelf, who by his Bond has ſubjected his Property to be determined by the Judgment.

Now as to the Authorities which ſeem directly to govern this Point, and the Objections againſt them.

1. There

1. There is Sir *Thomas Wroth*'s Case in [c] *Plowden*, which I rely upon as a clear and full Authority in this Case, notwithstanding all the Objections that have been made against it.

King *Henry* 8. had appointed Sir *Thomas Wroth*, to be Gentleman Usher of the Privy Chamber to Prince *Edward*, and that he granted to the said Sir *Thomas*, for the Exercise of the same Office, an Annuity of 20*l.* to be had, and yearly taken to the said Sir *Thomas*, from *Lady-Day* then last past, during his natural Life, by the Hands of the Treasurer of his Court of Augmentations of the Revenues of the Crown for the Time being, of such his Treasure of the same Revenues, as should remain in the Hands of the Treasurer at two Times in the Year, *&c.*

The chief Objection against this Case is, that there the Grant was under the Seal of the Court of Augmentations, which was incorporated with the Court of *Exchequer*; but that I deny, for that Court was never legally united to the Court of *Exchequer*, as was adjudged in *Dyer*, 216. So that the Objection, that Sir *Thomas Wroth*'s Grant was under the Seal of the Augmentation Court, and under the Survey of it, is gone.

Then it does not appear to me, that ever the Court of Augmentations had any Power expresly given to relieve the Grantees of such Rents. I have looked over the Act of Parliament, by which that Court is constituted, but I cannot find any such Power; but I think, the Court of Augmentations did proceed in such Manner, that it might be also reputed a Court of *Exchequer*; and the Court of Augmentations is, by express Words, made a Court for the new Revenues that should come to the Crown, which are exempted from

[b] Lord *Sommers*, his Argument, P. 90.
[c] *Plowd.* Com. P. 452.

from the Jurisdiction of the other Court: But that which I infer from hence is, that if this new Court of *Exchequer* did in some Cases relieve Grantees of Rents, *&c.* certainly the old Court of *Exchequer* shall have the same Privilege.

There are other Courts which have also proceeded in the same Manner; as the Court of Wards did usually hold Plea of these Matters. Queen *Elizabeth* granted to *Allen*, under her great Seal, an Annuity of 40*l. per Ann.* to be paid by her Receiver of the Court of Wards. This being payable by the Receiver, is in the Nature of a Rent-charge. So the Court of Surveyors, erected by 33 *H.* 8. Chap. 39. did proceed in the same Manner, and relieve Grantees of Rent-charges, *&c.*

As to [d] *Nevil*'s Case, also in [e] *Plowden*, I take it likewise to be a full Authority in Point. An yearly Rent-charge of 3*l.* 10*s.* was granted to Sir *H. Nevil*, and another for the Exercise of the Keeper of a Park, out of a Manor for their Lives; one is attainted, the Manor comes to the Possession of the King; the King shall neither have the Office nor the Rent: And the Arrears of the said Annuity were paid to Sir *H. Nevil*, at the Receipt of the *Exchequer*, by the Hands of the Treasurer and the Chamberlain.

First, I grant that those Lands were also under the Survey of the Court of [f] Augmentations; but that I conceive makes nothing against me for the Reasons before mentioned.

[g] There are several other Records which have been already quoted, but I shall not trouble you with the Repetition of them. I shall only mention some few, which I think have been omitted. As *Trin. primo Mar.*

[d] See Lord *Sommers*, his Argument, P. 88.
[e] *Plow.* Com. P. 377.
[f] Lord *Sommers*, his Argument, P. 95.
[g] See Lord *Sommer*'s Argument, P. 106.

Mar. Rot. 126. 2 *El. Rot.* 145. *Mich.* 13. *Q. Rot.* 347. *Hill.* 13 *El. Rot.* 143. *P.* 1 *Q. Rot.* 108. In all these Records it also appears, that Money issued out of the *Exchequer*, by Order of the Court of *Exchequer*; and it is highly reasonable that they should have such a Power.

Suppose the King purchaseth Land that is charged with a Rent, the King must take the Land together with its Burden; but in such Case it would be too hard to drive the Grantee of the Rent to his Petition of Right to the King: No, certainly he may come to the Court of *Exchequer*, by Way of Petition to the Barons, who may give him Relief.

It has been objected, that Money which once comes into the *Exchequer*, can never be taken out. But if this is true in a general Sense, that none of the King's Revenues that are brought into the *Exchequer* can be paid out, this would destroy all Annuities, Rent-charges, and other Payments which the Crown is obliged to make.

[b] It is true, if a Man be outlawed in the *King's-Bench*, and the Party's Goods are seized in the King's Hands, and then the Outlawry is reversed, there can be no Restitution. The Reason of this is, for that the Court of *King's-Bench* cannot send a Writ to the Treasurer; and the Court of *Exchequer* have no Record before them to issue out a Warrant of a Restitution. So if an Attainder be reversed, the mean Profits taken into the *Exchequer* cannot be restored for the same Reason; and also for that the King cannot be made a Disseisor, and the Statute gives a Remedy only as to Parliament.

There remains, after all, a great Objection, had it any Weight, and that is, *Cui bono?* If the Patentees should

[b] See Lord *Sommers*, his Argument, P. 63.

ſhould have Judgment for them, what will it ſignify if they cannot come at any Money?

As to this, I do think, that as ſoon as the Writs are delivered to the Officers of the *Exchequer*, I mean the Treaſurer and Chamberlain, the Property is altered, and the Officers become Debtors to the Parties, as appears by 2 *H.* 7. So as ſoon as a *Fieri facias* is delivered to the Sheriff, and upon it Goods are levied, the Property of the Goods is altered, and the Sheriff becomes a Debtor to the Plaintiff: So an Action of Debt will lie upon a *Liberate*, and ſo it has been adjudged.

I ſhall only obſerve one Thing more, and ſo conclude, and that is in Anſwer to my Lord Chief Juſtice *Treby*, for he ſtuck very hard at the Judgment given by the Barons, he thought that it was very erroneous, and therefore void; but with Submiſſion, I take this Judgment to be as well as it can be; and whereas it is ſaid in the Judgment, that the Money ſhall be paid by the Commiſſioners and Chamberlain of the Treaſury, it muſt be underſtood of the Receipt of the Treaſury, and not of the Lord High Treaſurer, which Office is long ſince expired.

As for the Levying of the Tallies mentioned in the Judgment, it does not hurt, it is at moſt but Surpluſage; but that which I inſiſt on is, that though this Judgment, in reſpect of Form, or any material Point of it, ſhould be erroneous, yet if your Lordſhip ſhould be of Opinion in the two firſt Points with Me, you will then give a new Judgment, ſuch as the Court of *Exchequer* ought to have given, for that is the Law of this Place, as appears by 31 *Ed.* 3. and this laſt Point was ſo ruled upon a Debate in the Houſe of Lords, and was the Caſe of the *King* and *Sainthill*, 30 *Car.* 2.

So

So that upon the Whole, I am of Opinion, that the Judgment given by the Barons, ought to be affirmed.

But afterwards, the Lord [i] Keeper was of Opinion to reverſe the Judgment, and accordingly it was reverſed. The Ground upon which he gave his Opinion was, that the Patentees had not taken a proper Remedy by Petition to the Barons, who have no Power or Control over the King's Treaſury, *&c.* and that their only Remedy was by Petition to the King himſelf. He inſiſted much upon the ſame Reaſons and Grounds which my Lord Chief Juſtice *Treby* mentioned.

The above Caſe had given Occaſion to Clamour, becauſe of the extenſive Conſequences following the Determination in Regard to the Property of large Numbers.

No *Liberate*, or Warrant [k] for Payment iſſued upon this Reverſal; but in the ſame Seſſion, an [l] Act paſſed to apply the Revenue of Exciſe as a Security for eight hundred and twenty thouſand Pounds, and a weekly Payment of three thouſand ſeven hundred Pounds, to the Civil Liſt, on Account of the Neceſſity of Affairs, ſubject, at the ſame Time, to the Charge of an annual Payment of three *per Cent.* on the whole Principal due to the Bankers, from and after the *twenty-ſixth* Day of *December*, 1705, which Principal was made redeemable on Payment of a Moiety. This Caſe in Reſpect of the unhappy Perſons, who had intruſted the Bankers with their Money, deſerved all that Compaſſion, with which it was popular to treat it in thoſe Times; but the Bankers had made an unjuſt and extorſive Pro-

[i] *Sommers*; ſee his Lordſhip's Argument, P. 128.
[k] *Tind.* Contin. *Rap.* Hiſt. *Eng.* 3 Vol. P. 405, in the Notes.
[l] Stat. 12 & 13 *W.* 3. Cap. 12.

fit from the Crown, and the iniquitous Extravagance of King *Charles* his Court had been the Source of the Calamity.

When the Lord Chancellor *Sommers* parted with the Great Seal on *Saturday* the *twenty-seventh* Day of *April*,[m] in the Year 1700, and the same continued undisposed of for some Time, King *William* pressed the Lord Chief Justice [n] *Holt* to accept of it; but he replied, "[o] *That he never had but one* Chancery *Cause in his Life, which he lost, and consequently could not think himself fitly qualified for so great a Trust*;" whereupon, (it being Term Time, so that a Vacancy in that Post put Things in some Confusion) a temporary [p] Commission was granted on *Sunday*, the *fifth* Day of *May*, in the said Year 1700, to [q] Sir *John Holt*, Sir *Thomas Trevor*, Master of the Rolls, Sir *George Treby*, Chief Justice of the *Common Pleas*, and Sir *Edward Ward*, Lord Chief Baron of the *Exchequer*, to judge in the Court of *Chancery*; and after a few Days the Seals were given to Sir *Nathan* [r] *Wright*.

9 In *Easter* Term, 1688, 10 *W.* 3. [s] *Richard Lane* brought an Action [t] upon his Case against Sir *Robert Cotton*

[m] Lord *Raym.* Rep. P. 566.

[n] Mr. *Prior*, in a Letter to the Earl of *Manchester*, dated at *Hampton-Court*, *May* 2, 1700, and printed among Mr. *Cole*'s Memoirs, P. 128, says thus: "My Lord Chief Justice *Holt*, having been here to Day, and with the King in private, has given People Occasion to say, that he has refused the Seals; if it be so or not, I cannot say, but as yet the Seals are not disposed of." *Tind.* Contin. *Rap.* Hist. *Eng.* 3 Vol. P. 406. in Notes.

[o] *Boyer*'s Annual List of the Deaths of eminent Persons, at the End of his History of Queen *Anne*, P. 52.

[p] *Burnet*'s History of his own Times, 2 Vol. P. 242.

[q] Lord *Raymond* and *Burnet* as above.

[r] Lord *Raym.* P. 567, and *Burnet* as above.

[s] *Modus Intrandi.* 2 Vol. P. 108.

[t] Lord *Raym.* Rep. P. 646.

Cotton and Sir *Thomas Frankland*, as Poſtmaſter General, for that a Letter of the Plaintiff's being delivered into the ſaid Office, to be ſent by the Poſt from *London* to *Worceſter*, by the Negligence of the Defendants in the Execution of their Office, was opened in the Office, and divers *Exchequer* Bills therein incloſed were taken away, *ad damnum*, *&c.* upon not guilty pleaded, this Cauſe was tried before *Holt*, Chief Juſtice at *Guildhall* in *London*, and a ſpecial Verdict found there.

The Jury found the Act of 12 *Car.* 2. Cap. 30. of the Execution of the General Poſt-office, and that a General-Poſt was eſtabliſhed purſuant to it, between *London* and *Worceſter*: They find the Act of 1 *Jac.* 2. Cap. 12. which conſolidates the Eſtates in Fee and in Tail in the ſaid Office in the King, that the Defendants were conſtituted Poſtmaſter General by Letters Patent of the King that now is, bearing Date the firſt Year of his Reign, under the Great Seal of *England*, purſuant to the ſaid Act of 12 *Car.* 2. And that by the ſaid Patent they had Power, to make Deputies, and to appoint Servants, at their Pleaſure, and to take Security of them, but in the Name, and to the Uſe, of the King, and that the Defendants ſhould obey ſuch Orders as they ſhould receive from Time to Time from the King, under the Sign Manual, and as to the Management of the Revenue, that they ſhould obey the Orders of the Treaſury, and farther, that the King granted to them, that they ſhould not be chargeable, to account for the Miſmanagement or Default of their inferior Officers, but only for their own voluntary Defaults; and farther, the King granted to them, a Salary of 1500*l. per Annum*, out of the Profits ariſing out of the Office, *&c.* that the Office was kept in *London*; that the Plaintiff being poſſeſſed of eight *Exchequer* Bills, incloſed them in a Letter directed to *John*

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Jones at *Worceſter*, and delivered it to *Underbill Breeze*, the Receiver of the Letters at the Poſt-office; that *Breeze* was appointed by the Defendants, to receive the Letters at the Office, and was removable by the Defendants, but received his Salary out of the Revenue of the ſaid Office, by the Hands of the Receiver General; that the Letter was opened in the Office, by a Perſon unknown, and the Bills were taken away; *et ſi, &c.*

This Caſe was argued ſeveral Times at the Bar, by Sir *Bartholomew Shower*, Mr. *Northy*[u], and Mr. *Pratt*[v], for the Plaintiff, and by Serjeant *Wright*[x], the Solicitor General *Hawles*[y], the Attorney General [z] *Trevor*, and [a] *Cowper*[b], for the Defendants. And in *Eaſter* Term, 1701,

[u] Afterwards Attorney General to their late Majeſties, King *William* the *third*, [Lord *Raym.* Rep. 2 Vol. P. 748, 768,] and Queen *Anne*, Lord *Raym.* Rep. 2 Vol. P. 768, 1261, 1317, and to *George* the *firſt*. Lord *Raym.* Rep. 2 Vol. P. 1318.

[v] Afterwards conſtituted Chief Juſtice of the *King's-Bench*, to *George* the *firſt*, *viz.* in *Eaſter* Term, 1718. *Stra.* Rep. P. 86. Append. to *Chron. Juridicial.* P. 13. Note; He was Father to the preſent Chief Juſtice of the *Common Pleas*.

[x] Afterwards, *viz.* 30 *Dec.* 1696, made Serjeant to King *William* the *third*. Append. to *Chron. Juridicial.* P. 5. Mod. Rep. 5 Vol. P. 323, and by him knighted. Lord *Raym.* Rep. P. 135. His ſaid Majeſty, on *Thurſday*, the 21ſt *May*, 1700, 12 *Will.* 3. in Council, delivered the Great Seal to Sir *Nathan Wright*, with the Title of Keeper of the Great Seal, *&c.* Lord *Raym.* Rep. P. 566, 567. Mod. Rep. 12 Vol. P. 478. Mod. Rep. 5 Vol. P. 323. Append. to *Chron. Juridicial.* P. 7.

[y] Mod. Rep. 5 Vol. P. 24. Lord *Raym.* Rep. P. 57. 2 Vol. P. 748.

[z] Afterwards, *viz.* 5 *July*, 1700, conſtituted Chief Juſtice of the *Common Pleas*. Appendix to *Chronica Juridicial.* P. 7. Mod. Rep. 12 Vol. P. 477. Lord *Raym.* Rep. 2 Vol. P. 748.

[a] Mod. Rep. 12 Vol. P. 478.

[b] Afterwards, in *Mich.* Term, 1727, 1 *Geo.* 2. he was by Patent, dated 27 *October*, 1727, created one of the Judges of the *Common Pleas*, in the Room of Sir *Francis Page*, who ſucceeded Mr. Juſtice *Forteſcue*, in the *King's-Bench*, whoſe Patent was ſuperceded. Lord *Raym.* Rep. 2 Vol. P. 1510. Appendix to *Chronica Juridicial.* P. 17.

1701, 13 *W.* 3. the Judges pronounced their Opinions in ſolemn Arguments, *viz. Turton*, *Powys*, and *Gould*, Juſtices, that Judgment ought to be given for the Defendants; and *Holt*, that Judgment ought to be for the Plaintiff.

[c] *Holt*, Chief Juſtice, argued, That Judgment ought to be given for the Plaintiff. And he ſaid, That he would not make it any Part of the Queſtion, if a Letter was broke open upon the Road, whether the Poſtmaſter General ſhould be chargeable for it; but he would confine himſelf to the preſent Queſtion, where a Letter was delivered at the Office to the proper Officer appointed to receive it and there loſt, whether in ſuch Caſe the Poſtmaſter General ſhould be liable. And he held, that he ſhould, for theſe Reaſons.

1. Becauſe the Poſtmaſter is by this Act intruſted with the Intereſt and Property of the Subject, to the End that no Damage may accrue to him; which is implied by the making him an Officer. The Act appoints one general Letter-office to be erected in *London*, and the Care thereof is committed to the Poſtmaſter General; who, his Deputies and Servants, ought to have the Management ſolely of the Poſt-office. So that all the Perſons concerned are as his Deputies. And by the Nature of the Truſt, he ought ſafely to keep all Letters there, at his Peril, in his Cuſtody. This Caſe does not differ from the Caſe of the Marſhal of the *King's-Bench*, or Warden of the *Fleet*, who are obliged ſafely to keep the Priſoners at their Peril; and it is no Plea for them, that Traitors broke the Priſon againſt their Will. And the Law was ſo, at Common Law, in Caſe of Damages recovered in Treſpaſs, *quare vi et armis*, and when the

[c] Lord *Raym.* Rep. P. 650. *Com.* Rep. P. 103. Caſ. Temp. *Holt*, P. 583. Mod. Rep. 12 Vol. P. 477.

Statute 25 *Edw.* 3. Cap. 17. made the Body liable to Execution for Debt, the Gaoler ought to keep ſuch, as ſafely as Defendants condemned for Damages in Treſpaſs, *Vi et Armis*. The ſame Law, if Goods levied upon a *Levari facias* (which was the only Execution before the Statute gave a *Fieri facias*) in Execution were reſcued from the Sheriff; he was liable to an Action. The ſame Law of a Man, in Execution upon the Statute of 13 *Edw.* 1. *de Mercatoribus*. The ſame Law, if upon an *extendi facias*, upon a Statute, merchant the Goods of the Conuſor, taken by the Sheriff, were reſcued from him. And there is no Difference between this Caſe of the Poſtmaſter General, and the Gaoler, Sheriff, *&c.* for he ought ſafely to keep the Letters delivered to him, as the others ought ſafely to keep their Priſoners, or Goods taken in Execution.

2. The Subject ought to pay a *Premium* for the Carriage, to him who makes it his Employment. And when a Man takes an Employment upon him, to receive the Goods of the Subjects, and receives a *Premium* for it, that is ſufficient, to charge him, to anſwer the Loſs at all Adventures, for ſuch Loſſes as happen within the Realm.

Objection, by *Gould*, Juſtice. That this Office is founded in Government.

Anſwer. If he means, that it is founded by the Law, he could not agree his Inference, becauſe it is only founded by a different Sort of Law, *viz.* the one by Common Law, the other by Statute Law, which cannot make a Difference. And he did not ſee in what Sort of Government it was otherwiſe founded, but only that a Truſt is given for the Benefit of the Subject.

Objection, by *Gould*, Juſtice. That ſuch Charge ought to be by ſome Sort of Contract.

An-

Anſwer. He denied that any Contract was neceſſary, to charge the Defendants; but it is like the Caſes, where Officers, by Courſe of Law, receive Goods for the Benefit of others, they are obliged to keep them ſafely by them, ſo that they may have the Benefit of them.

Objection. The Defendants receive no *Premium* from the Plaintiff.

Anſwer. The Plaintiff gives a *Premium*, which intitles him to a Remedy; and againſt whom ſhall he have it, if not againſt the public Officer, againſt the Poſtmaſter General, by whoſe Negligence he ſuffers. 2. The Defendants receive a *Premium*, *viz.* a Salary of 1500*l. per Annum* (which is a ſufficient Reward) paid out of the Profits of the Office. And, therefore, this Caſe is not diſtinguiſhable from the Caſe of *Mors & Slue*, *Ventr.* 190, 238. *T. Raym.* 220. in which Caſe the Objection was, that the Maſter of the Ship did not receive the Freight to his own Uſe; but adjudged, that he was liable for the Goods of which the Ship was robbed in the River: And the Reaſons given were, 1. Becauſe he was an Officer known. 2. Becauſe he received his Salary out of that which was paid for Freight; both which Reaſons hold in this Caſe.

Objection. The Maſter of the Ship might take Caution, *&c.* the Poſtmaſter General cannot.

Anſwer. He did not know how the Maſter of the Ship could Caution, *&c.* It was ſaid, in the Caſe of *Mors* and *Slue*, that if a Man came to lade Goods at an unſeaſonable Time, he was not obliged to take them in, as before he was ready to ſail. But if he takes them in before, and they are loſt, he will be liable to an Action. So a common Carrier may refuſe to admit Goods into his Warehouſe, before he is ready to take his Journey; but yet neither the one nor the

other can refuse to do the Duty incumbent upon them, by Virtue of their public Employment.

3. This Case is within the same Reason and Equity upon which the Cases are founded, in which Men are chargeable for negligent keeping; and this is the Reason, that if they should not be charged without assigning a particular Neglect, they might defraud any Man, and he would not be able to prove it; and that is the Reason of the Cases of Carriers, *&c.* And this Reason is given in *Justinian*, Lib. 4. Tit. 5. *Minsinger. comment.* Fol. 5617. Such Matter is transacted among a Multitude of People, and therefore no Particular of them can be charged; and therefore the Officer ought to be charged, who chuses such inferior Officers. The Case of *Mors* and *Slue* was harder, because there the Servants were overcome by a superior Force.

Objection. The common Carrier may sue the Hundred, the Postmaster General cannot sue any Body.

Answer. That is no Reason, because a Carrier was chargeable before the Statute of *Winton*, at which Time he could not sue the Hundred. Besides, that he is liable, where he has no Remedy against the Hundred; as for Goods lost out of his Warehouse, or out of his Waggon in the Yard.

Objection. The Inn-keeper is only chargeable for Goods in his Custody within his Inn, and not for a Horse put to Grass, and therefore it differs from this Case.

Answer. Here the Letter was within the Walls of the Post-house. But the Case of the Inn-keeper was stronger, because he is obliged, while he has Room, to let in all Travellers. But *contra* of the Postmaster General, who may chuse his Deputies and Servants.

Objection. The Inn-keeper has People up all the Night in the Inn.

An-

Anſwer. And the Poſtmaſter General alſo in the Poſt-office.

Objection. The Caſe of Sir *Henry Herbert* and Mr. *Paget*. *Sid.* 77. *T. Raym.* 53.

Anſwer. There *prima facia* they held the Defendant chargeable; but afterwards they were of Opinion for the Defendant, that he was not chargeable, becauſe the Clerks of Mr. *Henley* had Liberty to enter into the Treaſury without his Conſent, and ſo the Acceſs to the Records was not confined to his Servant only. But here Nobody could enter into the Poſt-office but the Servants of the Defendants only. This Caſe differs from the Loſs of a Letter upon the Road, (but to that he gave no Opinion;) for a Carrier receives Goods, ſafely to keep, and ſafely to carry; but the Poſtmaſter General receives the Letters, ſafely to keep and ſend; ſo that there may be a Queſtion, whether the Poſtmaſter ſhall be chargeable, when he has ſafely ſent the Letters out of the Office. But admit that he ſhould not be liable, when the Poſt-Boy is robbed upon the Road; yet it will not follow, that he is not chargeable for Letters taken out of the Office. In the Caſe of *Mors* and *Slue*, if the Ship had been at Sea, the Maſter would not have been liable; yet it does not follow, that he ſhall not be chargeable for a Loſs at Land. If a Man comes to an Inn, and orders the Inn-keeper to put his Horſe into the Stable, being hot, and to let him cool, and then to put him to graſs; becauſe the Inn-keeper ſhould not be chargeable, if he were ſtole after he is put to graſs, it does not follow from thence that he ſhall not be chargeable, if he be ſtole before he be turned to graſs, whilſt he is in the Stable.

4. It is the Duty of the Poſtmaſter to receive *Exchequer* Bills, and to ſend them by the Mail. For he ought to receive ſuch Packets as are proper to be ſent by the Poſt; and ſuch are *Exchequer* Bills.

1. If

1. If a Man takes upon him a public Employment, he is bound to ſerve the Public as far as the Employment extends; and for Refuſal, an Action lies, as againſt a Farrier refuſing to ſhoe a Horſe. Againſt an Inn-keeper refuſing a Gueſt, when he has Room. Againſt a Carrier refuſing to carry Goods, when he has Convenience, his Waggon not being full. He had known ſuch Action brought, and a Recovery upon it, and never diſputed. So an Action will lie againſt a Sheriff, for refuſing to execute Proceſs. The ſame Reaſon will hold, that an Action ſhould lie againſt the Poſtmaſter, for refuſing to receive a Letter, *&c.*

2. *Exchequer* Bills are proper to be ſent by the Poſt. The Act does not confine it to any ſpecific Thing, but generally of Packets. It appears, that the Act intended that other Things ſhould be ſent by the Poſt, as well as Letters. By the Words of the Act, Deeds, and other Things. Alſo *Exchequer* Bills are light, and a Pearl Necklace, of 1000*l.* Value, may be ſent by the Poſt.

Objection. *Exchequer* Bills are new Things created by Act of Parliament.

Anſwer. A new Intereſt, created by a ſubſequent Statute, will be under the ſame Remedy, as a Thing in *eſſe* before of the ſame Nature. And one may as well ſay, that *Trover*, or Treſpaſs will not lie for them, becauſe they are new Things. Bills of Exchange might have been ſent by the Poſt, and *Exchequer* Bills are like to them. A Bill of Exchange, payable to a Man, or Bearer, is a lawful Bill of Exchange, and may be ſent by the Poſt, as well as one payable to a Man or Order.

Objection. That the Poſtmaſter will not be chargeable for Bills of Exchange loſt, becauſe they are excepted out of the Act, that nothing ſhall be paid for them.

An-

Answer. That the Letter ought to be intended to be written for the Sake of the Bill, and therefore Payment is Payment for the Bill. As where a Man comes to an Inn, he shall pay nothing for the keeping of his Goods; yet the Advantage which the Inn-keeper hath by the Presence of the Guests, makes him liable.

3. *Exchequer* Bills are not excepted, and therefore shall pay Postage.

4. The Defendants, being public Officers, are chargeable, though they had no Benefit; as the Sheriff, tho' he has no Fees for suing of Executions. For where the Law gives a Man custody of a Thing, *Virtute Officii*, it obliges him to keep it safely. And therefore upon the Reason of *Southcote*'s Case, 4 *Co.* 83. *b.* If Goods are delivered to a Man to be safely kept, and he accepts them, he shall be chargeable if they are lost; and one cannot put a Case of a public Officer to the Contrary. The Opinion in 4 *Co.* 83. of a general Bailment, is not Law; for upon a general Bailment, the Baillee ought to keep them only as his own.

5. Before the 12 *Car.* 2. any one might have erected a Post-office, and such Erector had been liable for Miscarriage; and therefore this Postmaster is liable also; for now the Act having prohibited the Subjects to employ any other but this Postmaster General, it would be hard to deprive them of the Remedy which they had before.

Objection. The Plaintiff has a Remedy against *Breese*.

Answer. If it could be proved that *Breese* took out the *Exchequer* Bills, he agreed that it was so; likewise any Stranger that took them out may be charged as a *tort-feasor*; but *Breese* cannot be charged as an Officer for Neglect: For Misfeasance of a Deputy, an Action will

will lie againſt him, but that is not *qua* Officer, but *qua tort feaſor*. And according to this, is the Difference between a negligent and a voluntary Eſcape. A Gaoler is liable to an Action for the latter, but not for the former. This Office is manageable only by them, their Deputies and Servants, and what is done by a Deputy, is done by the Principal; and reaſonable, becauſe the Principal may remove the Deputy at Pleaſure, tho' he puts him in for Life, for it is contrary to the Nature of a Deputy, not to be removable.

A Deputy may forfeit the Office of the Principal; as if he does ſuch Act as would be a Forfeiture in the Principal.

Objection. *Dier* 238.

Anſwer. It is (by him) directly contrary to the Purpoſe, for which his Brother *Gould* cited it.

Objection. This will be to make the Defendants reſponſible here for the Servants of the Deputies.

Anſwer. If a Deputy has Power to make Servants, the Principal will be chargeable for their Misfeaſance, becauſe the Act of the Servant is the Act of the Deputy, and the Act of the Deputy is the Act of the Principal. But here *Breeſe* is the Servant of the Defendants themſelves.

Objection. The Defendants are but Fellow-Servants with *Breeſe*, becauſe all receive their Salaries from the King.

Anſwer. He is appointed by the Defendants, and is their Servant, and removable by them, though they do not pay him his Wages. But then ſuppoſe that *Breeſe* is not a Servant of the Defendants, then it will be ſtronger againſt the Defendants, for then *Breeſe* will be as a Stranger, and then they will be the rather liable, the Act appointing them to manage the Office by their Servants.

Ob-

Objection. *Powys*, Juſtice, compared the Defendants to a Captain of a Company; and he ſhall not be chargeable for the Cowardlineſs of his Soldiers; no more ſhall the Defendants for the Negligence of *Breeſe*, admitting him to be their Servant.

Anſwer. If *A* received a particular Damage by the Cowardlineſs of the Soldiers of a Captain, he ſhall be chargeable; but in ſuch Caſe the Prejudice is national. But the Maſter of a Ship is liable for the Neglect of his Mariners.

Objection. The Act did not intend that the Defendants ſhould be chargeable.

Anſwer. He was of a contrary Opinion, becauſe all the Power is placed in the Poſtmaſter General. And when a Statute erects a new Office, and places it under ſuch Circumſtances, as in Conſequence of Law, make the Officer liable; it muſt be preſumed to have been their Intent, that he ſhall be chargeable.

2. It appears by the Words of the Act, that they intended that the Diſpatches ſhould be ſafe.

3. It appears by the Act, that it was the Judgment of the Parliament, that they were liable for the Fault of the Deputy. *Par.* 3. It is provided, that the Poſtmaſters General, and their Deputies, *&c.* Then *Par.* 10. a Penalty of 5*l.* is impoſed upon the Poſtmaſter, if there be a Failure of furniſhing with Poſt-horſes; from whence it appears, that the Parliament looked upon the Fault of the Deputy to be the Fault of the Poſtmaſter.

Objection. This will ruin the Office.

Anſwer. It will make them more careful.

Objection. This will encourage Frauds.

Anſwer. The Method to prevent them, is to make the Poſtmaſter liable.

Objection. The Plaintiff might have ſent his *Exchequer* Bills by ſome other Means.

An-

Answer. That will not excuse the Defendants, no more than it will be an Excuse to an Inn-keeper, that his Guest, who has lost Goods, might have gone to another Inn.

Objection. The *Premium* limited by the Act is too small.

Answer. The Defendants have accepted the Office upon those Terms.

Objection. The Patent is, that they shall observe the Orders of the King, under the Sign Manual, and the Orders of the Treasury concerning the Revenue.

Answer. Their Observance of the Orders of the Treasury will not interrupt their Care of the Letters; and if a Prejudice happen by Observance of the King's Orders, that will not excuse; because they are obliged to observe the most convenient Methods for the Execution of the Office according to the Direction of the Act, and the Patent cannot excuse them in any Neglect of that.

Objection. There is a Clause in the Patent, that the Postmaster shall not be answerable for a Fault in their Deputy, but only for their own Act.

Answer. That is only intended of Imbezzlement of the Revenue by their Deputies, and as to that, the said Clause will excuse them; but it will not excuse them from any Remedy that the Subject hath against them for his Benefit by the Law. And no *non obstante* in such Case will avail, nor any Charter of Exemption. And for these Reasons he concluded, that Judgment ought to be given for the Plaintiff. But the other three Judges being of a contrary Opinion, Judgment was given for the Defendants. But however, the Plaintiff [d] intending to bring a Writ of Error upon the said Judg-

[d] A Writ of Error was brought and allowed on these Reasons of *Holt*, Chief Justice. Mod. Rep. 11 Vol. P. 18.

Judgment, the Defendants ſeeing that, paid the Money to the Plaintiff, as Lord Chief Juſtice *Raymond* was informed.

In *Eaſter* Term, 1701, 13 *Wil.* 3. the Chief Juſtice *Holt* gave his Reaſons of the Judgment of the Court of *King's-Bench*, in the Caſe of one *Plummer*, which Mr. Juſtice [f] *Foſter* ſays, his Lordſhip publiſhed; and alſo, [g] that the learned Judge (Lord Chief Juſtice *Holt*) entereth with great Learning and ſound Reaſon, into the Point upon which the Caſe turned; and as it ſeemed of very great Conſequence, it had been for two Vacations under the [h] Conſideration of all the Judges of *England*, before whom it had been ſeveral Times argued at *Serjeant's-Inn*, in *Chancery-Lane*.

Plummer, [i] the Priſoner, was indicted at the Aſſizes held for the County of *Kent*, *twenty-ninth* of *July*, 12 *Will.* 3. The Indictment ſets forth, that *John Glover*, and *Benjamin Plummer*, the Priſoner, and others, *thirteenth* of *March*, 12 *Will.* 3. did, of Malice fore-thought, make an Aſſault upon *John Harding*, and that *John Glover*, having a certain Fuzee in his Hand, charged with Gunpowder and Bullet, did felonioufly, voluntarily, and of his Malice fore-thought, diſcharge the ſame againſt the ſaid *John Harding*, and thereby gave him a mortal Wound, of which he inſtantly died. And that *Benjamin Plummer*, the Priſoner, and others, did, of their Malice fore-thought, aid, abet, and aſſiſt the ſaid *John Glover*, in committing the Murder aforeſaid. *Benjamin Plummer*, pleaded not Guilty, and the Jury did find this ſpecial Verdict, *viz.*

That *Joſeph Beverton*, was duly appointed to ſeize and apprehend all ſuch Wool of the Growth of this King-

[e] Lord *Raym.* Rep. P. 658. Mod. Rep. 5 Vol. P. 456.
[f] *Foſt.* Cr. Law, P. 204.
[g] Id. P. 296. Note *.
[h] Mod. Rep. 12 Vol. P. 627.
[i] *Kelyng*'s Rep. P. 109. Mod. Rep. 12 Vol. P. 627. See *Foſt.* Cr. Law, P. 352.

Kingdom, that ſhould be carried to be tranſported into Parts beyond the Seas, and alſo all ſuch Perſons as ſhould carry the Wool in order to be tranſported. And that *Benjamin Plummer*, *John Harding*, and others, whoſe Names are unknown, to the Number of eight Perſons, the ſaid *thirteenth* of *March*, about *twelve* o'Clock at Night, about ſeven Miles from the Sea, did Load three Horſes with eight hundred Pound of Wool, of the Growth of *England*, in order to tranſport it in into *France*. And *Joſeph Beverton* having Notice thereof, came with divers other Perſons to his Aſſiſtance, to a certain Lane, about ſeven Miles diſtant from the Sea; in order to ſtop and ſeize the Wool ſo intended to be tranſported, and placed themſelves in divers Places about the Lane; and *Joſeph Beverton*, with his Company, hearing the three Horſes laden with Wool, pronounced a Watch-word agreed on between him and his Aſſiſtants; and thereupon all of them uſed their utmoſt Endeavours to ſeize the Wool, whereupon, one of the eight Perſons, in Company with *Benjamin Plummer*, whoſe Name is unknown, did ſhoot off the Fuzee, and thereby did kill the ſaid *John Harding*, being one of the eight Perſons, and a Partner with them in that Deſign of tranſporting the Wool, of which Wound he died.

The Queſtion is, upon this ſpecial Verdict, whether *Benjamin Plummer* be guilty of the Murder as charged in the Indictment, or ſo much as of the Death of *John Harding*?

To put the Caſe in as few Words as may be, ſo as to bring it to a Point, it is no more than this, eight Perſons had loaded a Quantity of Wool, to carry it to be tranſported; of which the King's Officers having Intelligence, did, in the Night-time, as they were carrying the Wool, meet to oppoſe, and to apprehend them, and they met in a Lane, and upon a Watch-word given by the

the King's Officers, one of the eight Perſons ſhot off a Fuzee, and killed another of the eight Perſons, whether the others of the Eight (beſides him that ſhot off the Gun) be guilty of the Murder of the Perſon ſlain?

Upon this Queſtion all the Judges have been conſulted, and we are all of Opinion, that *Benjawin Plummer* is not guilty of the Murder of *John Harding*.

1. It doth not appear, by the finding of this ſpecial Verdict, that *Glover*, or the Perſon unknown, that ſhot off the Gun, did diſcharge it againſt any of the King's Officers, but it might be, for ought appears, for another Purpoſe; though upon the particular Circumſtances in the ſpecial Verdict, there is Evidence that the Gun was diſcharged againſt the King's Officers, and ſo it might reaſonably be intended, conſidering they were all armed, and in Proſecution of an unlawful Act in the Night, which they deſigned to juſtify and maintain by Force, eſpecially when the Gun was ſhot off upon the Watch-word given, the King's Officers were endeavouring to ſeize the Wool; the Jury thereupon might well have found that the Fuzee was diſcharged againſt the King's Officers; but ſince they have not found that Matter, we are confined to what they have found poſitively, and are not to judge the Law upon Evidence of a Fact, but upon the Fact as it is found.

Therefore it is fit to conſider in this Caſe, 1. What Crime it is in the Party that ſhot off the Gun that killed *Harding*?

2. How far the Reſt of his Company that were with him ſhall be concerned in the Guilt of it.

1. He was upon an unlawful Deſign, and if he had in the Purſuance thereof diſcharged the Fuzee againſt any of the King's Officers that came to reſiſt him in that Deſign, and by Accident had killed one of his own Accomplices, it would have been Murder in him. As if a Man, out of Malice to *A*, ſhoots at him to kill

him, but misses him, and kills *B*, it is no less a Murder, than if he had killed the Person intended.

But 2*dly*, it not appearing that he discharged his Fuzee against the King's Officer, it may be, that he discharged it either out of some Provocation from *Harding*, or wilfully out of some precedent Malice against him.

1. It seems to me hard upon a special Verdict to construe, that the Fuzee went off by Accident, but it must be understood to be voluntary; though even in an Indictment for Manslaughter it is requisite that it should be averred that he discharged it voluntarily, but in a Verdict it need not be so alledged, but the saying he did it, must be understood to be with, and not against his Will; for where any one, upon any killing of a Man, is to be discharged by an involuntary killing, it must be so found, without which it must be understood to be voluntary; for a Man being a free Agent, if he be found to do any Act, it must be supposed to be with his Will, unless it be specially, and particularly found to be against his Will. Therefore when a Man is indicted for a voluntary killing, if he did kill the Man by Misadventure, the special Circumstances of the Case must be found, that it may appear to the Court to be by Accident.

2. But in the next Place, suppose that he that shot off the Fuzee did it out of Malice prepensed against the Person slain, whereby it would be Murder in him. Then the Question will be, whether the Rest of his Accomplices shall be adjudged to be Principals to him, as Aiders, Abettors, or Assisters to that Murder, and we all held that they would not be Principals. For though they are all engaged upon an unlawful Act, and while they were actually in it, this Murder is committed by one of the Company so engaged; yet it does not appear to be done in Prosecution of that unlawful

Act,

Act, but it may be upon another Account, and thoſe who are in the unlawful Act, not knowing of the Deſign of him that killed the other, his Companion cannot be guilty of it. This Notion that hath been received, that if divers Perſons be engaged in an unlawful Act, and one of them kills another, it ſhall be Murder in all the Reſt, is very true; but it muſt be admitted with ſeveral Qualifications. Firſt, the Abettor muſt know of the malicious Deſign of the Party killing. As for the Purpoſe, *A* and *B* having Malice, engage in a Duel; *C*, a Stranger, of a ſudden, takes Part with *A*, who kills *B*. It is but Manſlaughter in *C*, becauſe he knew not of the Malice, though it be Murder in *A*.

If divers Men lie in wait to beat a particular Perſon, and one of them, while they are in Proſecution of that unlawful Deſign, out of Malice he had to another of his Companions, finding an Opportunity, kills him, the Reſt are not concerned in the Guilt of the Fact.

At the Seſſions at the *Old Bailey*, *December*, 1664. The Caſe upon the Evidence was, that the Secretary of State made a Warrant to apprehend divers ſuſpected Perſons, which was directed to a Meſſenger, who having Notice that they were in an Houſe, deſired ſeveral Soldiers to aſſiſt him in the apprehending of them, but in the doing thereof, they broke open the Doors, and ſome of the Soldiers ſtole ſome Goods. It was held, that the Warrant then produced, was not ſufficient to break open the Doors of the Houſe without a Civil Officer. Secondly, though the breaking open the Door was an unlawful Act, of which all were guilty; yet was it Felony only in thoſe that ſtole the Goods, or knew of the Deſign of Stealing, and conſented to it; but not in the others that were concerned in breaking open the Doors: No more in this Caſe can the Reſt of the Company be ſaid to be guilty of the killing of

Harding, unleſs they knew of the Perſon's Deſign to kill him.

2. The Killing muſt be in Purſuance of that unlawful Act, and not collateral to it. As for the Purpoſe; if divers come to hunt in a Park, and the Keeper commands them to ſtand, and reſiſts them; if one of the Company kills the Keeper, it is not only Murder in him, but in all the Reſt then preſent, that came upon that Deſign, for it was done in Purſuance of the unlawful Act.

But ſuppoſe that they coming into the Park to hunt, before they ſee the Keeper, there is an accidental Quarrel happens amongſt them, and one kills the other, it will not be Murder, but Manſlaughter; and in the Reſt that were not concerned in that Quarrel, it will not be Felony. So if one kills his Companion upon a former Malice, the others will not be concerned in it, therefore cannot be Abettors, becauſe ſtrangers to the Deſign. And that, for ought appears, might be this Caſe, for my Brother *Gould*, that tried this Cauſe, informs us, that there was ſome Reaſon to believe, that he that diſcharged the Fuzee againſt the Perſons ſlain, did it upon the Account, that he conceived that the other had betrayed their Deſign; and no Doubt it was Murder in him that ſhot off the Fuzee, but not in the others, unleſs privy to his Purpoſe, for it was not done in Proſecution of that unlawful Act; but if he had ſhot off the Gun againſt the King's Officers, and by Accident had killed one of his own Party, all the Reſt of them would have been Abettors and Principals.

A and *B* are fighting together out of Malice prepenſed, *C* comes to part them, and *A* kills *C*, this is Murder in *A*, and ſome ſaid in *B* alſo, but the major Number were of a contrary Opinion; for though *B* was engaged in an unlawful Act as well as *A*, yet the killing

of

of *C* by *A*, was not in Pursuance of, but collateral to it, but the killing of *C* by *A*, was Murder, because he killed one doing his Duty, which was endeavouring to keep the Peace; and would have hindred him from killing *B*, against whom he had Malice.

3. There is another Qualification of this Rule, that the doing an unlawful Act, whereby a Person is slain, shall make the Killer to be a Murderer; that the unlawful Act ought to be deliberate. For if it be sudden, as upon an Affray that suddenly falls out, and the Parties are divided amongst themselves, and fall to fighting, and one kills the other, it is but Manslaughter. So if upon a sudden Affray, the Constable, or other Person, comes to keep the Peace, and some knowing him to be the Constable, or Person coming to keep the Peace, shall kill him, it is Murder in him, and all that assisted him in doing it; but in others that continue the Affray, and knew not that the Constable, or other Person was coming to keep the Peace, it will be no Crime: For first, though the Constable did come to keep the Peace, it is necessary that the Parties engaged in the Tumult have Notice that he comes for that Purpose, otherwise the killing him will not be Murder, but only Manslaughter in him that kills him; and in Consequence, no Crime in the Persons that did not know him to be there, and did not contribute towards his Death. At the Sessions after *Hil.* Term, 19 *Car.* 2. *Thompson* and his Wife were fighting together in the House of *Allen Daws*, who seeing them fighting, came in, and endeavoured to part them, thereupon *Thomas* thrust away *Daws*, and threw him down upon an Iron in the Chimney, which broke one of his Ribs, of which he died; this upon a special Verdict, was held to be only Manslaughter, though the Peace was broke, and the Person slain came only to keep the Peace; and it is the same if he

had been Conſtable. But then it was reſolved, that if the Conſtable, or other Perſon, came to keep the Peace be killed, it is neceſſary the Perſon that kills him do know, or be acquainted that he came for that Purpoſe. Therefore he ought to charge them, in the King's Name, to keep the Peace, for otherwiſe, the Party fighting, may think he cometh in Aid of the other with whom he is fighting. And *Mackally*'s Caſe doth not oppoſe this, but agrees with it in the Reaſon there given, which is in theſe Words, *viz.* when an Officer, or Miniſter of the King, corrects another in the Name of the King, or requires the Breakers of the Peace to keep the Peace in the King's Name; if any notwithſtanding reſiſt, and kill the Officer, it is Murder; but if he had not Notice that he was the Officer, it is only Manſlaughter in him that killed; but then, by the ſame Reaſon, the others that are in the Affray, which was ſudden, did continue in the Affray, but did not reſiſt the Conſtable, it cannot be Murder or Manſlaughter in them, for their Act cannot be extended farther than a Breach of the Peace.

But ſuppoſe the Riot, or the Aſſembly had been deliberate, and they deſigned doing an unlawful Act, in which they are oppoſed by the Conſtable or any other Perſon, and one kills the Perſon oppoſing, it is Murder in all. *George* came with divers Perſons, in a riotous Manner, to the Houſe of *B*, upon the Account of ſeizing ſome Goods, and uſing there ſome angry Speeches, a Kinſwoman of them both travelling indifferently between them to appeaſe, was ſuddenly ſtricken in the Head, with a Stone thrown over the Wall, by one of the Servants of *George*, whereof ſhe afterwards died, and by much the greater Opinion of the Judges and King's Council, it was held to be Murder in all the Accomplices; and though ſhe came as a Stranger, and was indifferent to all, yet they came

with

with Malice againſt *B*, and in Purſuance, and in Execution of that Riot, the Woman was killed.

4. As the unlawful Act ought to be deliberate to make the killing Murder, ſo it ought to be ſuch an Act as may tend to the Hurt of another, either immediately, or by neceſſary Conſequence. If Perſons are in a Riot, and go with offenſive Arms, or with Clubs and Staves, and in that Riot, one of the Company kills another, it is Murder in him, and in all the Reſt that are engaged in the Riot, though but Lookers on. But if ſuch unlawful Act doth not tend immediately, or by neceſſary Conſequence to the Danger of another, though Death enſue hereby, it is but Manſlaughter.

Shooting at a Deer in another's Park is an unlawful Act: If the Arrow glanceth and kills a Man, this is but Manſlaughter, which is contrary to 3 *Inſt.* 56. that holds it to be Murder: But Lord *Hale* 31. ſaith it is but Manſlaughter, and the Reſt of the Company will be guilty, for they were all Abettors to the unlawful Act.

The Deſign of doing any Act makes it deliberate; and if the Fact be deliberate, though no Hurt to any Perſon can be foreſeen, yet if the Intent be felonious, and the Fact deſigned, if committed, would be Felony, and in Purſuit thereof, a Perſon is killed by Accident, it will be Murder in him and all his Accomplices. As for the Purpoſe: Divers Perſons deſign to commit a Burglary, and ſome of them are ſet to watch in a Lane to hinder any from going to the Houſe to interrupt them, if any comes in their Way, and thoſe that are to keep Watch kill him, thoſe that are ſent to rob the Houſe will be guilty of that Murder, though they do not commit the Burglary.

So if two Men have a Deſign to ſteal an Hen, and one ſhoots at the Hen for that Purpoſe, and a Man be killed, it is Murder in both, becauſe the Deſign is felonious.

lonious. So is Lord *Coke*, 56. ſurely to be underſtood, with that Difference; but without this Difference, none of the Books quoted in the Margin, do warrant that Opinion; nor indeed can I ſay that I find any to warrant my Opinion, but only the Reaſon is ſubmitted to the Judgment of thoſe Judges that may at any Time hereafter have that Point judicially brought before them.

Theſe Things I thought fit to mention, tho' ſome of them are not ſuch Premiſſes from which the Concluſion to this Matter in Queſtion may be drawn, yet they all tend to illuſtrate the Matter and Reaſon that we rely upon, which is, that though the Perſon that ſhot off the Fuzee againſt the Perſon ſlain, did it maliciouſly, and ſo it would be Murder in him, yet the others not knowing of his Deſign againſt that Perſon, cannot be adjudged to be Aiders and Abettors of that Murder.

Secondly, if it had appeared upon the Verdict, that the Fuzee had been diſcharged againſt the King's Officer, and by Accident, *Harding*, one of the Company, had been killed, it would have been Murder in the Reſt, becauſe it was done in Purſuance of that Deſign, which was deliberate, and in the Proſecution whereof Hurt and Miſchief might enſue; and their being together, is an Evidence that they did intend to maintain their unlawful Deſign by Force, and that the ſhooting the Gun was againſt the Officer: But this Matter being only evidence of it, it ought to have been conſidered by the Jury, but we, as Judges, cannot take Notice of it.

Upon the Acceſſion to the Throne of her late Majeſty Queen *Anne*, there had been an Act made in the Reign of King *William* the *third*, empowering all Perſons in Offices of Truſt, to act therein after his Deceaſe as before, for ſix Months, unleſs otherwiſe

diſ-

displaced by the Succeſſor; and particularly in the Office of Chief Juſtice, which was *quam diu ſe bene geſſerit*, yet his Lordſhip held it to be determined by the Demiſe of the King, notwithſtanding the above Act, and therefore politicly declined exerciſing the ſaid Office, whereupon the Queen in Council gave Orders that he ſhould have a new Writ.[g]

On the *twenty-firſt* of *February*, 1703, [h] 2 *Anne*, *James Boucher*, formerly *Aid de Camp*, and Gentleman of the Horſe to the Duke of *Berwick*, was arraigned before the Lord Chief Juſtice *Holt*, the Lord Chief Juſtice *Trevor*, the Lord Chief Baron *Ward*, the Juſtices *Powel*, *Powis*, *Gould*, and *Tracy*, and the Barons *Bury* and *Price*, appointed by a ſpecial Commiſſion of *Oyer* and *Terminer* at the *Queen's Bench* Bar, upon two Indictments for High Treaſon; one, for being in Arms in the Service of the late King *James* in *Ireland*; and the other, for returning from *France* into *England* without Licence, againſt the Form of the Statute made in the *eighth* Year of King *William*. The Court being ſat, and the Indictments read, Mr. *Boucher* pleaded guilty: And then having obtained Leave to ſpeak, he endeavoured to extenuate his Crime by ſeveral Allegations, [particularly mentioned by Mr. *Boyer*, which did not ſeem to require much Notice here, and therefore are omitted] the Priſoner concluded with hoping that his Lordſhip (the Lord Chief Juſtice *Holt*) would repreſent his Caſe favourably to the Queen.

Then Dr. *Sands* begged Leave to ſpeak in Behalf of the Priſoner; but being told by the Lord Chief Juſtice *Holt*, that all he could do now (the Priſoner having pleaded guilty) would ſignify nothing; and that if he had any Thing to ſay, he muſt apply himſelf elſewhere,

[g] Stat. 12 & 13. *Will.* 3. Chap. 2.
Lord *Raym.* Rep. 2 Vol. P. 747. *Forteſc.* Rep. P. 389. *Cro. Car.* Rep. P. 1.

[h] *Boyer's* Hiſtory of Queen *Anne*, P. 120, 121.

where, and the Attorney General demanding Judgment againſt the Priſoner, upon his Confeſſion of the two Indictments: "Mr. *Boucher*, (ſaid the Lord Chief Juſtice *Holt*) you are by your own Confeſſion, convicted of High Treaſon; for which, Judgment of Death is to be pronounced upon you, and which you are to ſuffer, under thoſe Circumſtances which the Law has appointed. The Fact, of which you were accuſed, and have now confeſſed, is, that ſince the *eleventh* Day of *December*, 1688, you went into *France*, either from the late King, or Queen, and have returned ſince the *fourteenth* of *January*, 1697, without any Licence under the Privy Seal, either from the late King, or her Majeſty that now is; which Fact is made High Treaſon by the [1] Statute of the *eighth* Year of the late King. The Wiſdom and Juſtice in making that Law, will be evident to any one, that will but reflect upon the Poſture of our Affairs at that Time. For in the Year preceding to that of the making thereof, there was an horrid Conſpiracy formed, from among the Party of Men who had then left the Kingdom, to aſſaſſinate the late King, to introduce a Popiſh and *French* Power, for the Subverſion of the Proteſtant Religion, and the Liberties and Properties of the People of *England*; which was managed with that Privacy, and carried on with that Secrecy, that it was not diſcovered; nay, not ſo much as ſuſpected, until it arrived to that Maturity, that it was come to the very Point of being put in Execution. In the following Year, the Peace of *Reſwick* was made, whereby the Intercourſe was reſtored between *England* and *France*; from whence it was evident, that divers of that Party of Men would return into the Realm, and thereby have an Opportunity to revive and carry on that horrid Deſign, in the Succeſs whereof they had been ſo diſappointed; for which,

[1] 8 *W.* 3. Chap. 5.

which, no doubt, they were not a little encouraged: And it could not be otherwiſe expected, but they would make uſe of it; for thoſe of the ſame Principles will be guilty of the ſame Practices. Therefore it was neceſſary to make a Returning into *England*, by any of thoſe who were under theſe Circumſtances, to be very penal; unleſs they ſhould firſt give Satisfaction to the Governmen, either of their Innocence, or Repentance, and obtain a Licence and Approbation for their Return, under the Privy Seal. For their returning in any other Manner, is a Danger to the Queen's Perſon and her Kingdom. This Treaſon, though it ſeems, and is new in the Form, yet it is compounded of an old Treaſon, known in the antient Law of the Kingdom; which is, that of adhering to the King's Enemies. For what can be thought of thoſe, who, in Time of War, ſhall abandon their own Country, be harboured and protected in any Enemy's Country, for being of an Intereſt inconſiſtent with, even repugnant to that of their own? What your Deſigns might be in returning in this Manner, whether to revive and purſue theſe wicked Practices, your own Conſcience is your Witneſs, and will be your Judge: And if that ſhall acquit you, it will be for your Advantage in the World to come. But you are an Offender againſt the Law of this Land, which has made this your Offence to be High Treaſon." And thereupon his Lordſhip pronounced the Judgment appointed for one guilty of that Crime: Which done, the Priſoner was remanded to *Newgate*.

In *Trinity* Term, 1703, 2 *Anne*, Lord Chief Juſtice *Holt* delivered his Argument in another Caſe, and as my Lord [k] *Raymond* ſays, of great Conſequence, it was after a Verdict for the Plaintiff, upon a Motion in Arreſt of Judgment.

His

[k] Lord *Raym.* Rep. 2 Vol. P. 909.

His Lordship said, the Case was shortly this. "The Defendant, [*William*[1] *Bernard*,[m]] undertakes to remove Goods from one Cellar to another, and there lay them down safely, and he managed them so negligently, that for want of Care in him some of the Goods were spoiled. Upon not guilty pleaded there has been a Verdict for the Plaintiff [*John*[1] *Coggs*] and that upon full Evidence, the Cause being tried before me at *Guildhall*. There has been a Motion in Arrest of Judgment, that the Declaration is insufficient, because the Defendant is neither laid to be a common Porter, nor that he is to have any Reward for his Labour. So that the Defendant is chargeable by his Trade, and a private Person cannot be charged in an Action without a Reward.

I have had a great Consideration of this Case, and because some of the Books make the Action lie upon the Reward, and some upon the Promise, at first I made a great Question, whether this Declaration was good. But upon Consideration, as this Declaration is, I think the Action will well lie. In order to shew the Grounds, upon which a Man shall be charged with Goods put into his Custody, I must shew the several Sorts of Bailments. And there are six Sorts of Bailments. The first Sort of Bailment is, a bare naked Bailment of Goods, delivered by one Man to another, to keep for the Use of the Bailor; and this I call a *Depositum*, and it is that Sort of Bailment which is mentioned in *Southcote*'s Case. The second Sort is, when Goods or Chattels that are useful, are lent to a Friend *gratis*, to be used by him, and this is called *commodatum*, because the Thing is to be restored in *Specie*. The third

[1] *Salk.* Rep. 2 Vol. P. 735.

[m] Lord *Raym.* Rep. 2 Vol. P. 912. *Com.* Rep. P. 133. *Salk.* Rep. P. 26. pl. 12. *Salk.* Rep. 3 Vol. P. 11, 268. Cas. *Temp. Holt*, P. 13. pl. 14. P. 131. pl. 2. P. 528.

third Sort is, when Goods are left with the Bailee to be uſed by him for Hire: This is called *Locatio et Conductio*, and the Lender is called *Locator*, and the Borrower *Conductor*. The fourth Sort is, when Goods or Chattels are delivered to another as a Pawn, to be a Security to him for Money borrowed of him by the Bailor: And this is called in *Latin*, *Vadium*, and in *Engliſh*, a Pawn or a Pledge. The fifth Sort is, when Goods or Chattels are delivered to be carried, or ſomething is to be done about them for a Reward to be paid by the Perſon who delivers them to the Bailee, who is to do the Thing about them. The ſixth Sort is, when there is a Delivery of Goods or Chattels to ſomebody, who is to carry them, or do ſomething about them *gratis*, without any Reward for ſuch his Work or Carriage, which is this preſent Caſe. I mention theſe Things, not ſo much that they are all of them ſo neceſſary, in order to maintain the Propoſition which is to be proved, as to clear the Reaſon of the Obligation, which is upon Perſons in Caſes of Truſt.

As to the firſt Sort, where a Man takes Goods in his Cuſtody to keep for the Uſe of the Bailor, I ſhall conſider, for what Things ſuch a Bailee is anſwerable. He is not anſwerable, if they are ſtolen without any Fault in him. Neither will a common Neglect make him chargeable, but he muſt be guilty of ſome groſs Neglect. There is, I confeſs, a great Authority againſt me, where it is held, that a general Delivery will charge the Bailee to anſwer for the Goods if they are ſtolen, unleſs the Goods are ſpecially accepted, to keep them only as you will keep your own. But my Lord *Coke* has improved the Caſe in his Report of it, for he will have it, that there is no Difference between a ſpecial Acceptance to keep ſafely, and an Acceptance generally to keep. But there is no Reaſon nor Juſtice in ſuch a Caſe of a general Bailment, and where the

the Bailee is not to have any Reward, but keeps the Goods merely for the Uſe of the Bailor, to charge him without ſome Default in him. For if he keeps the Goods in ſuch a Caſe with an ordinary Care, he has performed the Truſt repoſed in him. But according to this Doctrine, the Bailee muſt anſwer for the Wrongs of other People, which he is not, nor cannot be, ſufficiently armed againſt. If the Law be ſo, there muſt be ſome juſt and honeſt Reaſon for it, or elſe ſome univerſal ſettled Rule of Law, upon which it is grounded; and therefore it is incumbent upon them, that advance this Doctrine, to ſhew an undiſturbed Rule and Practice of the Law according to this Poſition. But to ſhew that the Tenor of the Law was always otherwiſe, I ſhall give an Hiſtory of the Authorities in the Books in this Matter, and by them ſhew, that there never was any ſuch Reſolution given before *Southcote*'s Caſe. The 29 *Aſſ.* 28. is the firſt Caſe in the Books upon that Learning, and there the Opinion is, that the Bailee is not chargeable, if the Goods are Stole: As for 8 *Edw.* 2. *Fitz. detinue*, 59. where Goods were locked in a Cheſt, and left with the Bailee, and the Owner took away the Key, and the Goods were ſtolen, and it was held that the Bailee ſhould not anſwer for the Goods. That Caſe they ſay differs, becauſe the Bailor did not truſt the Bailee with them. But I cannot ſee the Reaſon of that Difference, nor why the Bailee ſhould not be charged with Goods in a Cheſt, as well as with Goods out of a Cheſt. For the Bailee has as little Power over them, when they are out of a Cheſt, as to any Benefit he might have by them, as when they are in a Cheſt; and he has as great a Power to defend them in the one Caſe as in the other. The Caſe of 9 *E.* 4. 40 *b.* was but a Debate at Bar. For *Danby* was but a Counſel then, though he had been Chief Juſtice in the Beginning of *Edw.* 4. yet he was re-

removed and restored again upon the Restitution of *Hen.* 6. as appears by *Dugdale*'s *Chronica Series*. So that what he said cannot be taken to be any Authority. For he spoke only for his Client; and *Genney*, for his Client, said the Contrary. The Case in 3 *Hen.* 7. 4. is but a sudden Opinion, and that but by half the Court, and yet that is the only Ground for this Opinion of my Lord *Coke*, which, besides, he has improved. But the Practice has been always at *Guildhall*, to disallow that to be a sufficient Evidence, to charge the Bailee, and it was practised so before my Time, all Chief Justice *Pemberton*'s Time, and ever since, against the Opinion of that Case. When I read *Southcote*'s Case heretofore, I was not so discerning as my Brother *Powys* tells us he was, to disallow that Case at first, and came not to be of this Opinion, till I had well considered and digested that Matter. Though I must confess Reason is strong against the Case, to charge a Man for doing such a friendly Act for his Friend, but so far is the Law from being so unreasonable, that such a Bailee is the least chargeable for neglect of any, for if he keeps the Goods bailed to him, but as he keeps his own, though he keeps his own but negligently, yet he is not chargeable for them, for the keeping them as he keeps his own, is an Argument of his Honesty. *A fortiori*, he shall not be charged, where they are stolen without any Neglect in him. Agreeable to this, is *Bracton*, *Lib.* 3. *Cap.* 2. 99. *b.* J. S. *apud quem Res deponitur, Re obligatur, et de eâ Re, quam accepit, restituenda tenetur, et etiam ad id, si quid in Re depositâ Dolo commiserit; Culpæ autem Nomine non tenetur, scilicet Desidiæ vel Negligentiæ, quia qui negligenti Amico Rem custodiendam tradit, sibi ipsi et propriæ Fatuitati hoc debet imputare.* As suppose the Bailee is an idle, careless, drunken Fellow, and comes home drunk, and leaves all his Doors open, and by Reason thereof the Goods hap-

happen to be ſtolen with his own; yet he ſhall not be charged, becauſe it is the Bailor's own Folly to truſt ſuch an idle Fellow. So that this Sort of Bailee is the leaſt reſponſable for Neglects, and under the leaſt Obligation of any one, being bound to no other Care of the bailed Goods, than he takes of his own. This *Bracton*, I have cited, is, I confeſs, an old Author, but in this, his Doctrine is agreeable to Reaſon, and to what the Law is in other Countries. The Civil Law is ſo, as you have it in *Juſtinian*'s *Inſt.* Lib. 3. Tit. 15. There the Law goes farther, for there it is ſaid, *ex eo ſolo tenetur, ſi quid Dolo commiſerit: Culpæ autem Nomine, id eſt, Deſidiæ ac Negligentiæ, non, tenetur. Itaque ſecurus eſt qui parum diligenter cuſtoditam Rem Furto amiſerit, quia qui negligenti Amico rem cuſtodiendam tradit, non ei, ſed ſuæ Facilitati id imputare debet.* So that a Bailee is not chargeable without an apparent groſs Neglect. And if there is ſuch a groſs Neglect, it is looked upon as an Evidence of Fraud. Nay, ſuppoſe the Bailee undertakes ſafely and ſecurely to keep the Goods, in expreſs Words, yet even that won't charge him with all Sort of Neglects. For if ſuch a Promiſe were put into Writing, it would not charge ſo far, even then. A Covenant, that a Covenantee ſhall have, occupy, and enjoy certain Lands, does not bind againſt the Acts of wrong doers. So upon a Promiſe for quiet Enjoyment. And if a Promiſe will not charge a Man againſt wrong doers, when put in Writing, it is hard it ſhould do it more ſo, when ſpoken. *Doct. & Stud.* 130. is in Point, that though a Bailee do promiſe to redeliver Goods ſafely, yet if he have nothing for the keeping of them, he will not be anſwerable for the Acts of a wrong doer. So that there is neither ſufficient Reaſon nor Authority to ſupport the Opinion in *Southcote's* Caſe; if the Bailee be guilty of groſs Negligence, he will be chargeable, but not for any ordinary Neglect.

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As to the ſecond Sort of Bailment, *viz. commodatum*, or lending *gratis*, the Borrower is bound to the ſtricteſt Care and Diligence, to keep the Goods, ſo as to reſtore them back again to the Lender, becauſe the Bailee has a Benefit by the Uſe of them, ſo as if the Bailee be guilty of the leaſt Neglect, he will be anſwerable; as if a Man ſhould lend another an Horſe; to go Weſtward, or for a Month; if the Bailee go Northward, or keep the Horſe above a Month, if any Accident happen to the Horſe in the Northern Journey, or after the Expiration of the Month, the Bailee will be chargeable; becauſe he has made Uſe of the Horſe contrary to the Truſt he was lent to him under, and it may be, if the Horſe had been uſed no otherwiſe than he was lent, that Accident would not have befallen him. This is mentioned in *Bracton, ubi ſupra*: His Words are, *Is autem cui Res aliqua utenda datur, Re obligatur, quæ commodata eſt, ſed magna Differentia eſt inter mutuum et commodatum; quia is qui Rem mutuam accepit, ad ipſam reſtituendam tenetur, vel ejus Pretium, ſi fortè Incendio, Ruinâ, Naufragio, aut Latronum vel Hoſtium Incurſu, conſumpta fuerit, vel deperdita, ſubtracta, vel ablata. Et qui Rem utendam accepit, non ſufficit ad Rei Cuſtodiam, quod talem Diligentiam adhibeat, qualem ſuis Rebus propriis adhibere ſolet, ſi alius eam diligentius potuit cuſtodire; ad Vim autem majorem, vel Caſus fortuitos non tenetur quis, niſi Culpa ſua intervenerit. Ut ſi Rem ſibi commodatam domi, ſecum detulerit cum peregrè profectus fuerit, non eſt Dubium quin ad Rei Reſtitutionem teneatur.* I cite this Author, though I confeſs he is an old one; his Opinion is reaſonable, and very much to my preſent Purpoſe, and there is no Authority in the Law to the contrary. But if the Bailee put this Horſe in his Stable, and he were ſtolen from thence, the Bailee ſhall not be anſwerable for him, but if he, or his Servants leave the Houſe or Stable Doors open, and the

Thieves take the Opportunity of that, and ſteal the Horſe, he will be chargeable, becauſe the Neglect gave the Thieves the Occaſion to ſteal the Horſe. *Bracton* ſays, the Bailee muſt uſe the utmoſt Care, but yet he ſhall not be chargeable, where there is ſuch a Force as he cannot reſiſt.

As to the third Sort of Bailment, *ſcilicet Locatio*, or lending for Hire, in this Caſe the Bailee is alſo bound to take the utmoſt Care, and to return the Goods, when the Time of the Hiring is exſpired. And here again, I muſt recur to my old Author, Fol. 62. *b. Qui pro Uſu Veſtimentorum, Auri vel Argenti, vel alterius Ornamenti, vel Jumenti, Mercedem dederit vel promiſerit, talis ab eo deſideratur Cuſtodia, qualem diligentiſſimus Paterfamilias ſuis Rebus adhibet, quam ſi præſtiterit, et Rem aliquo Caſu amiſerit, ad Rem reſtituendam non tenebitur. Nec ſufficit aliquam talem Diligentiam adhibere, qualem ſuis Rebus propriis adhiberet, niſi talem adhibuerit, de quâ ſuperius dictum eſt.* From whence it appears, that if Goods are let out for a Reward, the Hirer is bound to the utmoſt Diligence, ſuch as the moſt diligent Father of a Family uſes; and if he uſes that, he ſhall be diſcharged. But every Man, how diligent ſoever he be, being liable to the Accident of Robbers, though a diligent Man is not ſo liable as a careleſs Man, the Bailee ſhall not be anſwerable in this Caſe, if the Goods are ſtolen.

As to the fourth Sort of Bailment, *viz. Vadium*, or a Pawn, in this I ſhall conſider two Things, firſt, what Property the Pawnee has in the Pawn or Pledge, and ſecondly, for what Neglects he ſhall make Satisfaction. As to the firſt, he has a ſpecial Property, for the Pawn is a Security for the Pawnee, that he ſhall be repaid his Debt, and to compel the Pawnor to pay him. But if the Pawn be ſuch as it will be the worſe for uſing, the Pawnee cannot uſe it, as Cloaths, *&c.*

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but if it be ſuch, as will be never the worſe, as if Jewels for the Purpoſe were pawned to a Lady, ſhe might uſe them. But then ſhe muſt do it at her Peril, for whereas, if ſhe keeps them locked up in her Cabinet, if her Cabinet ſhould be broke open, and the Jewels taken from thence, ſhe would be excuſed; if ſhe wears them abroad, and is there robbed of them, ſhe will be anſwerable. And the Reaſon is, becauſe the Pawn is in the Nature of a Depoſit, and as ſuch is not liable to be uſed. And to this Effect is *Ow.* 123. But if the Pawn be of ſuch a Nature, as the Pawnee is at any Charge about the Thing pawned, to maintain it, as an Horſe, Cow, *&c.* then the Pawnee may uſe the Horſe in a reaſonable Manner, or Milk the Cow, *&c.* in Recompence for the Meat. As to the ſecond Point, *Bracton* 99. *b.* gives you the Anſwer. *Creditor, qui Pignus accepit, Re obligatur, et ad illam reſtituendam tenetur; et cum hujuſmodi Res in Pignus data ſit utriuſque gratiâ, ſcilicet Debitoris, quo magis ei Pecunia crederetur, et Creditoris, quo magis ei in tuto ſit creditum, ſufficit ad ejus Rei Cuſtodiam Diligentiam exactam adhibere, quam ſi præſtiterit, et Rem Caſu amiſerit, ſecurus eſſe poſſit, nec impedietur creditum petere.* In Effect, if a Creditor takes a Pawn, he is bound to reſtore it upon the Payment of the Debt; but yet it is ſufficient, if the Pawnee uſe true Diligence, and he will be indemnified in ſo doing, and notwithſtanding the Loſs, yet he ſhall reſort to the Pawnor for his Debt. Agreeable to this is 29 *Aſſ.* 28. and *Southcote*'s Caſe. But, indeed, the Reaſon given in *Southcote*'s Caſe is, becauſe the Pawnee has a ſpecial Property in the Pawn. But that is not the Reaſon of the Caſe; and there is another Reaſon given for it in the Book of Aſſize, which is, indeed, the true Reaſon of all theſe Caſes, that the Law requires nothing extraordinary of the Pawnee, but only that he ſhall uſe an ordinary Care for reſtoring the

Goods. But, indeed, if the Money for which the Goods were pawned, be tendered to the Pawnee before they are loſt, then the Pawnee ſhall be anſwerable for them; becauſe the Pawnee, by detaining them after the Tender of the Money, is a wrong doer, and it is a wrongful Detainer of the Goods, and the ſpecial Property of the Pawnee is determined. And a Man that keeps Goods by Wrong, muſt be anſwerable for them at all Events, for the detaining of them by him, is the Reaſon of the Loſs. Upon the ſame Difference, as the Law is, in Relation to Pawns, it will be found to ſtand in Relation to Goods found.

As to the fifth Sort of Bailment, *viz.* a Delivery to carry, or otherwiſe manage, for a Reward to be paid to the Bailee, thoſe Caſes are of two Sorts; either a Delivery to one that exerciſes a public Employment, or a Delivery to a private Perſon. Firſt, if it be to a Perſon of the firſt Sort, and he is to have a Reward, he is bound to anſwer for the Goods at all Events. And this is the Caſe of the common Carrier, common Hoyman, Maſter of a Ship, *&c.* which Caſe of a Maſter of a Ship was firſt adjudged 26 *Car.* 2. in the Caſe of *Mors* and *Slew*. The Law charges this Perſon thus intruſted, to carry Goods, againſt all Events, but Acts of God, and of the Enemies of the King. For though the Force be never ſo great, as if an irreſiſtible Multitude of People ſhould rob him, nevertheleſs he is chargeable. And this is a politic Eſtabliſhment, contrived by the Policy of the Law, for the Safety of all Perſons, the Neceſſity of whoſe Affairs oblige them to truſt theſe Sort of Perſons, that they may be ſafe in their Ways of Dealing; for elſe theſe Carriers might have an Opportunity of undoing all Perſons that had any Dealings with them, by combining with Thieves, *&c.* and yet doing it in ſuch a clandeſtine Manner, as would not be poſſible to be diſcovered. And this is

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the Reaſon the Law is founded upon in that Point. The ſecond Sort are Bailies, Factors, and ſuch like. And though a Bailee is to have a Reward for his Management, yet he is only to do the beſt he can. And if he be robbed, *&c.* it is a good Account. And the Reaſon of his being a Servant is not the Thing; for he is at a Diſtance from his Maſter, and acts at Diſcretion, receiving Rents and ſelling Corn, *&c.* and yet if he receives his Maſter's Money, and keeps it locked up with a reaſonable Care, he ſhall not be anſwerable for it, though it be ſtolen. But yet this Servant is not a domeſtic Servant, nor under his Maſter's immediate Care. But the true Reaſon of the Caſe is, it would be unreaſonable to charge him with a Truſt, farther than the Nature of the Thing puts it in his Power to perform. But it is allowed in the other Caſes, by Reaſon of the Neceſſity of the Thing. The ſame Law of a Factor.

As to the ſixth Sort of Bailment, it is to be taken, that the Bailee is to have no Reward for his Pains, but yet, that by his ill Management, the Goods are ſpoiled. Secondly, it is to be underſtood, that there was a Neglect in the Management. But thirdly, if it had appeared, that the Miſchief happened by any Perſon that met the Cart in the Way, the Bailee had not been chargeable. As if a drunken Man had come by in the Streets, and had pierced the Caſk of Brandy; in this Caſe the Defendant had not been anſwerable for it, becauſe he was to have nothing for his Pains. Then the Bailee having undertaken to manage the Goods, and having managed them ill, and ſo by his Neglect a Damage has happened to the Bailor, which is the Caſe in Queſtion, what will you call this? In *Bracton*, Lib. 3. 100. it is called *Mandatum*. It is an Obligation which ariſes *ex Mandato*. It is what we call in *Engliſh* an acting by Commiſſion for another *gratis*, and in the

executing his Commiſſion behaves himſelf negligently, he is anſwerable. *Vinnius* in his Commentaries upon *Juſtinian*, Lib. 3. Tit. 27. 684. defines *Mandatum* to be, *Contractus, quo aliquid gratuito gerendum committitur et accipitur.* This undertaking obliges the Undertaker to a diligent Management. *Bracton, ubi ſupra,* ſays, *contrabitur etiam Obligatio non ſolum Scripto et Verbis, ſed et Conſenſu, ſicut in Contractibus bonæ Fidei; ut in Emptionibus, Venditionibus, Locationibus, Conductionibus, Societatibus, et Mandatis.* I do not find this Word in any other Author of our Law, beſides, in this Place, in *Bracton*, which is a full Authority, if it be not thought too old. But it is ſupported by good Reaſon and Authority.

The Reaſons are firſt, becauſe in ſuch a Caſe, a Neglect is a Deceit to the Bailor. For when he intruſts the Bailee upon his undertaking to be careful, he has put a Fraud upon the Plaintiff by being negligent, his Pretence of Care being the Perſuaſion that induced the Plaintiff to truſt him. And a Breach of a Truſt undertaken voluntarily will be a good Ground for an Action. *Rol.* Abr. 10. 2 *Hen.* 7. 11. a ſtrong Caſe to this Matter. There the Caſe was an Action againſt a Man, who had undertaken to keep an hundred Sheep, for letting them be drowned by his Default. And there the Reaſon of the Judgment is given, becauſe when the Party has taken upon him to keep the Sheep, and after ſuffers them to periſh in his Default; in as much as he has taken and executed his Bargain, and has them in his Cuſtody, if after he does not look to them, an Action lies. For here is his own Act, *viz.* his Agreement and Promiſe, and that after broke of his Side, that ſhall give a ſufficient Cauſe of Action.

But ſecondly, it is objected, that there is no Conſideration to ground this Promiſe upon, and therefore the Undertaking is but *nudum Pactum*. But to this I an-

anſwer, that the Owners truſting him with the Goods, is a ſufficient Conſideration to oblige him to a careful Management. Indeed, if the Agreement had been executory, to carry theſe Brandies from one Place to the other ſuch a Day, the Defendant had not been bound to carry them. But this is a different Caſe, for *Aſſumpſit* does not only ſignify a future Agreement, but in ſuch a Caſe as this, it ſignifies an actual Entry upon the Thing, and taking the Truſt upon himſelf. And if a Man will do that, and miſcarries in the Performance of his Truſt, an Action will lie againſt him for that, though nobody could have compelled him to do the Thing. The 19 *Hen.* 6. 49. and the other Caſes cited by my Brothers, ſhew that this is the Difference. But in the 11 *Hen.* 4. 33. this Difference is clearly put, and that is the only Caſe concerning this Matter, which has not been cited by my Brothers. There the Action was brought againſt a Carpenter, for that he had undertaken to build the Plaintiff an Houſe within ſuch a Time, and had not done it, and it was adjudged the Action would not lie. But there the Queſtion is put to the Court, what if he had built the Houſe unſkilfully, and it is agreed in that Caſe an Action would have lain. There has been a Queſtion made, if I deliver Goods to *A*, and in Conſideration thereof he promiſes to redeliver them, if an Action will lie for not redelivering them, and in *Yelv.* 4. Judgment was given, that the Action would lie, but that Judgment was afterwards reverſed, and according to that Reverſal, there was Judgment afterwards entered for the Defendant in the like Caſe. *Yelv.* 128. But thoſe Caſes were grumbled at, and the Reverſal of that Judgment in *Yelv.* 4. was ſaid, by the Judges, to be a bad Reſolution, and the contrary to that Reverſal was afterwards moſt ſolemnly adjudged in *Cro. Jac.* 667. *Tr.* 21 *Jac.* 1. in the *King's-Bench*, and that

Judgment affirmed upon a Writ of Error. And yet there is no Benefit to the Defendant, nor no Conſideration in that Caſe, but the having the Money in his Poſſeſſion, and being truſted with it, and yet this is held to be a good Conſideration. And ſo a bare being truſted with another Man's Goods, muſt be taken to be a ſufficient Conſideration, if the Bailee once enter upon the Truſt, and take the Goods into his Poſſeſſion. The Declaration in the Caſe of *Mors* and *Slew*, was drawn by the greateſt Drawer in *England* in that Time, and in that Declaration, as it was always in all ſuch Caſes, it was thought moſt prudent to put in, that a Reward was to be paid for the Carriage, and ſo it has been uſual to put it in the Writ, where the Suit is by Original. I have ſaid thus much in this Caſe, becauſe it is of great Conſequence, that the Law ſhould be ſettled in this Point. But I do not know whether I may have ſettled it, or may not rather have unſettled it. But however that happen, I have ſtirred theſe Points, which wiſer Heads in Time may ſettle. And Judgment was given for the Plaintiff, with the Concurrence of the other three [a] Judges.

[b] There had been great Complaints long made, and which had encreaſed much within theſe few Years, of great Partiality and Injuſtice in the Elections of Parliament Men, both by Sheriffs in Counties, and by the returning Officers in Boroughs. In *Ayleſbury*, the Return was made by four Conſtables, and it was believed, that they made a Bargain with ſome of the Candidates, and then managed the Matter, ſo as to be ſure, that the Majority ſhould be for the Perſon, to whom they had engaged themſelves; they canvaſſed about the Town, to know how the Votes were ſet, and they reſolved to find ſome Pretence for diſabling thoſe, who were

[a] *Cam.* Rep. P. 134.
[b] *Burnet's* Hiſtory of his own Times, 2 Vol. P. 366, 367.

were engaged to vote for other Persons than their Friends, that they might be sure to have the Majority in their own Hands. And when this Matter came to be examined by the *House of Commons*, they gave the Election always for him who was reckoned of the Party of the Majority, in a Manner so barefaced, that they were scarce out of Countenance, when they were charged for Injustice in judging of Elections. It was not easy to find a Remedy, to such a crying Abuse, of which all Sides in their Turns, as they happened to be depressed, had made great Complaints; but when they came to be the Majority, seemed to have forgot all, that they had formerly cried out on. Some few excused this, on the Topic of Retaliation; they said, they dealt with others as they had dealt with them, or their Friends. At last, an Action was brought against the Constables of *Aylesbury*, at the Suit of one *Ashby*, who had been always admitted to vote in former Elections, but was denied it in the last Election. This was tried at the *Assizes*, and it was found there by the Jury, that the Constables had denied him a Right, of which he was undoubtedly in Possession, so they were to be cast in Damages; but a Motion was made in the *Queen's-Bench*, in Arrest of Judgment, since no Action did lie, or had ever been brought upon that Account. [e] *Powel*, [d] *Powis*, and [e] *Gould*, were of Opinion, that no Hurt was done the Man; that the judging of Elections belong to the *House of Commons*; that as this Action was the first of its Kind, so if it was allowed, it would bring on an Infinity of Suits, and put all the Officers, concerned in that Matter, upon great Difficulties: Lord Chief Justice *Holt*, though alone, yet differed from the Rest. His Lordship gave his Opinion in

[c] Lord *Raym.* Rep. 2 Vol. P. 946.
[d] Ibid. P. 943.
[e] Ibid. P. 941.

in the following excellent Argument; it was delivered (after the Case having for the Difficulty been ordered to stand in the Paper, and argued in *Trinity* Term, 1702, 1 *Anne*,[1]) in *Trinity* Term, 1703, 2 *Anne*.

[2] The single Question in this Case is, whether, if a free Burgess of a Corporation, who had an undoubted Right to give his Vote in the Election of a Burgess to serve in Parliament; be refused and hindered to give it by the Officer, an Action on the Case will lie against such Officer? I am of Opinion, that Judgment ought to be given in this Case for the Plaintiff. My Brothers differ from me in Opinion, and all from one another in the Reasons of their Opinion; but notwithstanding their Opinion, I think the Plaintiff ought to recover, and that this Action is well maintainable, and ought to lie. My Brother *Gould* thinks no Action will lie against the Defendant, because, as he says, he is a Judge; my Brother *Powis*, indeed says, he is no Judge, but *quasi* a Judge; but my Brother *Powel* is of Opinion, that the Defendant neither is a Judge, nor any thing like a Judge, and that is true: For the Defendant is only an Officer to execute the Precept, *i. e.* only to give Notice to the Electors of the Time and Place of Election, and to assemble them together in order to elect, and upon the Conclusion to cast up the Poll, and declare which Candidate has the Majority. But to proceed, I will do these two Things: First, I will maintain, that the Plaintiff has a Right and Privilege to give his Vote: Secondly, in Consequence thereof, that if he be hindered in the Enjoyment or Exercise of that Right, the Law gives him an

[1] Id. Ibid.

[2] Lord *Raym.* Rep. 2 Vol. P. 949. *Salk.* Rep. P. 20. Mod. Rep. 6 Vol. P. 50. State Trials, 8 Vol. P. 89. Cases *Temp. Holt*, P. 524. *Salk.* Rep. 3 Vol. P. 18. *Burnet's* Hist. of his own Times, 2 Vol. P. 367.

an Action againſt the Diſturber, and that this is the proper Action given by the Law.

I did not at firſt think it would be any Difficulty, to prove that the Plaintiff has a Right to vote, nor neceſſary to maintain it, but from what my Brothers have ſaid in their Arguments, I find it will be neceſſary to prove it. It is not to be doubted, but that the Commons of *England* have a great and conſiderable Right in the Government, and a Share in the Legiſlature, without whom no Law paſſes; but becauſe of their vaſt Numbers this Right is not exerciſeable by them in their proper Perſons, and therefore by the Conſtitution of *England* it has been directed, that it ſhould be exerciſed by Repreſentatives, choſen by and out of themſelves, who have the whole Right of all the Commons of *England* veſted in them: And this Repreſentation is exerciſed in three different Qualities, either as Knights of Shires, Citizens of Cities, or Burgeſſes of Boroughs, and theſe are the Perſons qualified to repreſent all the Commons of *England*. The Election of Knights belongs to the Freeholders of the Counties, and it is an original Right veſted in and inſeparable from the Freehold, and can no more be ſevered from their Freehold, than their Freehold itſelf can be taken away. Before the Statute of 8 *H.* 6. Cap. 7. any Man that had a Freehold, though never ſo ſmall, had a Right of Voting, but by that Statute, the Right of Election is confined to ſuch Perſons as have Lands or Tenements, to the yearly Value of forty Shillings at leaſt, becauſe, as the Statute ſays, of the Tumults and Diſorders which happened at Elections, by the exceſſive and outragious Number of Electors; but ſtill the Right of Election is as an original Right, incident to, and inſeparable from the Freehold. As for Citizens and Burgeſſes, they depend on the ſame Right as the Knights of Shires, and differ only as to the Tenure,

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but the Right and Manner of their Election is on the ſame Foundation. Now Boroughs are of two Sorts; firſt, where the Electors gave their Voices by Reaſon of their Burgerſhip; or, ſecondly, by Reaſon of their being Members of the Corporation. *Littleton*, in his Chapter of Tenure in Burgage 162. *Co. Lit.* 108. *b.* 109. ſays, Tenure in Burgage is, where an antient Borough is, of the which the King is Lord, of whom the Tenants hold by certain Rent, and it is but a Tenure in Socage: And Sect. 164. he ſays, and it is to wit, that the antient Towns called Boroughs, be the moſt antient Towns that be within *England*, and are called Boroughs, becauſe of them come the Burgeſſes to Parliament. So that the Tenure of Burgage is from the Antiquity, and their Tenure in Socage is the Reaſon of their Eſtate, and the Right of Election is annexed to their Eſtate. So that it is part of the Conſtitution of *England*, that theſe Boroughs ſhall elect Members to ſerve in Parliament, whether they be Boroughs corporate or not corporate; and in that Caſe the Right of Election is a Privilege annexed to the Burgage Land, and is, as I may properly call it, a real Privilege. But the ſecond Sort is, where a Corporation is created by Charter, or by Preſcription, and the Members of the Corporation as ſuch chuſe Burgeſſes to ſerve in Parliament. The firſt Sort have a Right of chuſing Burgeſſes as a real Right, but here in this laſt Caſe it is a perſonal Right, and not a real one, and is exerciſed in ſuch Manner as the Charter or Cuſtom preſcribes; and the Inheritance of this Right, or the Right of Election itſelf, is in the whole Body politic, but the Exerciſe and Enjoyment of this Right is in the particular Members. And when this Right of Election is granted within Time of Memory, it is a Franchiſe that can be given only to a Corporation, as is reſolved by all Judges againſt my Lord *Hobart*, in the

the Caſe of *Dungannon* in *Ireland*, 12 *Co.* 120, 121. That if the King grant to the Inhabitants of *Iſlington*, to be a free Borough, and that the Burgeſſes of the ſame Town may elect two Burgeſſes to ſerve in Parliament, that ſuch a Grant of ſuch Privilege to Burgeſſes not incorporated is void, for the Inhabitants have not Capacity to take an Inheritance. See *Hob.* 15. The principal Caſe there was, the King conſtituted the Town of *Dungannon* to be a free Borough, and that the Inhabitants thereof ſhould be a Body politic and corporate, conſiſting of one Provoſt, twelve free Burgeſſes, and Commonalty, and by the ſame Name might ſue and be ſued; *et quod ipſi præfati Præpoſiti, et liberi Burgenſes Burgi prædicti, et Succeſſores ſui in perpetuum habeant plenam Poteſtatem et Authoritatem eligendi, mittendi, et retornandi duos diſcretos et idoneos Viros ad inſerviendum, et attendendum in quolibet Parliamento, in dicto Regno noſtro Hiberniæ in poſterum tenendo*, and ſo proceeds to give them Power to treat, and give Voice in Parliament, as other Burgeſſes of any other antient Borough, either in *Ireland* or *England*, have uſed to do, and upon this Grant it was adjudged by all the Judges of *England*, that this Power to elect Burgeſſes is an Inheritance of which the Provoſt and Burgeſſes were not capable, for that it ought to be veſted in the intire Corporation, *viz.* Provoſt, Burgeſſes, and Commonalty, and that therefore the Law in this Caſe did veſt that Privilege in the whole Corporation in Point of Intereſt, though the Execution of it was committed to ſome Perſons, Members of the ſame Corporation. 12 *Co.* 120, 121, *Hob.* 14, 15. As to the Manner of Election, every Borough ſubſiſts on its own Foundation, and where this Privilege of Election is uſed by particular Perſons, it is a particular Right veſted in every particular Man; for if we conſider the Matter, it will appear, that the par-

particular Members and Electors, their Perſons, their Eſtates, and their Liberties, are concerned in the Laws that are made, and they are repreſented as particular Perſons, and not *quatenus* a Body politic; therefore, when their particular Rights and Properties are to be bound (which are much more valuable, perhaps, than thoſe of the Corporation) by the Act of the Repreſentative, he ought to repreſent the private Perſons. And this is evident, from all the Writs, which were antiently iſſued for levying the Wages of the Knights and Burgeſſes that ſerved in Parliament. As 46 *Edw.* 3. *Rot. Parl. Memb.* 4. *in dorſo.* For when Wages were paid to the Members, they were not aſſeſſed upon the Corporation, but upon the Commonalty as private Perſons, as the Writ ſhews, which, indeed, is directed to the Sheriff, or to the Mayor, *&c.* yet the Command is, *quod de Communitate, Civitatis, vel Burgi, habere faciat Militibus, Civibus, aut Burgenſibus,* 10l. *pro Expenſis ſuis.* But now if the Corporation were only to be repreſented, and not the particular Members of it, then the Corporation only ought to be at the Charge; but it is plain, that the particular Members are at the Charge. And all this is no new Thing, but agreeable to Reaſon and the Rules of Law, that a Franchiſe ſhould be veſted in the Corporation aggregate, and yet the Benefit of it to redound to the particular Members, and to be enjoyed by them in their private Capacity, as in the Caſe of *Waller* and *Hanger*, *Mo.* 832, 833, where the King granted to the Mayor and Citizens of *London, quod nulla Priſagia fuit ſoluta de Vinis Civium et liberorum Hominum de London.* And there it was reſolved, that although the Grant be to the Corporation, yet it ſhould not enure to the Body politic of the City, but to the particular Perſons of the Corporation, who ſhould have the Fruit and Execution of the Grant for their

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private Wines, and it ſhould not extend to the Wines belonging to the Body politic; and ſo is the conſtant Experience at this Day. So in the Caſe of *Millor* and *Spateman*, *Saund.* 343. where the Corporation of *Derby* claim common by Preſcription, and though the Inheritance of the Commons be in the Body politic, yet the particular Members enjoy the Fruit and Benefit of it, and put in their own Cattle to feed on the Common, and not the Cattle belonging to the Corporation; but that is not indeed our Caſe. But from hence it appears, that every Man that is to give his Vote on the Election of Members to ſerve in Parliament, has a ſeveral and a particular Right in his private Capacity, as a Citizen and Burgeſs. And ſurely it cannot be ſaid, that this is ſo inconſiderable a Right, as to apply that Maxim to it, *de minimis non curat Lex.* A right that a Man has to give his Vote to the Election of a Perſon to repreſent him in Parliament, there to concur to the making of Laws, which are to bind his Liberty and Property, is a moſt tranſcendent Thing, and of an high Nature, and the Law takes Notice of it as ſuch in diverſe Statutes: As in the Statute of 34 & 35 *H.* 8. Cap. 13. intituled an Act for making of Knights and Burgeſſes within the County and City of *Cheſter*; where in the Preamble it is ſaid, that whereas the ſaid County Palatine of *Cheſter* is, and hath been always hitherto exempt, excluded, and ſeparated out, and from the King's Court, by Reaſon whereof the ſaid Inhabitants have hitherto ſuſtained manifold Diſheriſons, Loſſes, and Damages, as well in their Lands, Goods, and Bodies, as in the good, civil, and politic Governance, and Maintenance of the Common Wealth of their ſaid County, *&c.* ſo that the Opinion of the Parliament is, that the Want of this Privilege occaſions great Loſs and Damage. And the ſame farther appears, from the 25 *Car.* 2. Cap. 9.

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an Act to enable the County Palatine of *Durham* to ſend Knights and Burgeſſes to ſerve in Parliament. Which recites, whereas the Inhabitants of the County Palatine of *Durham* have not hitherto had the Liberty and Privilege of electing and ſending any Knights and Burgeſſes to the high Court of Parliament, *&c.* The Right of voting at the Election of Burgeſſes, is a Thing of the higheſt Importance, and ſo great a Privilege, that it is a great Injury to deprive the Plaintiff of it. Theſe Reaſons have ſatisfied me as to the firſt Point.

If the Plaintiff has a Right, he muſt of Neceſſity have a Means to vindicate and maintain it, and a Remedy if he is injured in the Exerciſe or Enjoyment of it; and, indeed, it is a vain Thing to imagine a Right without a Remedy; for want of Right, and want of Remedy, are reciprocal. As if a Purchaſer of an Advowſon in Fee-ſimple, before any Preſentment, ſuffer an Uſurpation, and ſix Months to paſs without bringing his *quare impedit*, he has loſt his Right to the Advowſon, becauſe he has loſt his *quare impedit*, which was his only Remedy; for he could not maintain a Writ of Right of Advowſon; and though he afterwards uſurp and die, and the Advowſon deſcend to his Heir, yet the Heir cannot be remitted, but the Advowſon is loſt for ever without Recovery. 6 *Co.* 50. Where a Man has but one Remedy to come at his Right, if he loſes that, he loſes his Right. It would look very ſtrange, when the Commons of *England* are ſo fond of their Right of ſending Repreſentatives to Parliament, that it ſhould be in the Power of a Sheriff, or other Officer, to deprive them of that Right, and that they ſhould have no Remedy; it is a Thing to be admired at by all Mankind. Suppoſing then that the Plaintiff had a Right of Voting, and ſo it appears on the Record, and the Defendant has excluded him

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from it, Nobody can ſay, that the Defendant has done well; then he muſt have done ill, for he has deprived the Plaintiff of his Right: So that the Plaintiff having a Right to vote, and the Defendant having hindered him from it, it is an Injury to the Plaintiff. Where a new Act of Parliament is made for the Benefit of the Subject, if a Man be hindered from the Enjoyment of it, he ſhall have an Action againſt ſuch a Perſon who ſo obſtructed him. How elſe comes an Action to be maintainable by the Party on the Statute of 2 *Ric.* 2. C. 5. *de Scandalis Magnatum*, 12 *Co.* 134. but in Conſequence of Law? For the Statute was made for the Preſervation of the public Peace, and that is the Reaſon that no Writ of Error lies in the *Exchequer* Chamber by Force of the Statute of 27 *Eliz.* C. 8. in a Judgment in the *King's-Bench*, on an Action *de Scandalis*, for it is not included within the Words of the Statute; for though the Statute ſays, ſuch Writ ſhall lie upon Judgments in Actions on the Caſe, yet it does not extend to that Action, although it be an Action on the Caſe, becauſe it is an Action of a far higher Degree, being founded ſpecially upon a Statute. If then, when a Statute gives a Right, the Party ſhall have an Action for the Infringement of it, is it not as forcible when a Man has his Right by the Common Law? This Right of Voting is a Right in the Plaintiff by the Common Law, and conſequently he ſhall maintain an Action for the Obſtruction of it. But there wants not a Statute too in this Caſe, for by *Weſt.* 1. Cap. 5. it is enacted, that for as much as Elections ought to be free, the King forbids, upon grievous Forfeiture, that any great Man, or other, by Power of Arms, or by Malice or Menaces, ſhall diſturb to make free Election. 2 *Inſt.* 168, 169. And this Statute, as my Lord *Coke* obſerves, is only an Inforcement of the Common Law; and if the Parliament thought the Freedom of Election

to be a Matter of that Conſequence, as to give their Sanction to it, and to enact that they ſhould be free; it is a Violation of that Statute, to diſturb the Plaintiff in this Caſe in giving his Vote at an Election, and conſequently actionable.

And I am of Opinion, that this Action on the Caſe is a proper Action. My Brother *Powell* indeed thinks, that an Action upon the Caſe is not maintainable, becauſe here is no Hurt or Damage to the Plaintiff; but ſurely every Injury imports a Damage, though it does not coſt the Party one Farthing, and it is impoſſible to prove the contrary, for a Damage is not merely pecuniary, but an Injury imports a Damage, when a Man is thereby hindered of his Right. As in an Action for ſlanderous Words, though a Man does not loſe a Penny by Reaſon of ſpeaking them, yet he ſhall have an Action. So if a Man gives another a Cuff on the Ear, though it coſt him nothing, no not ſo much as a little *Diachylon*, yet he ſhall have his Action, for it is a perſonal Injury. So a Man ſhall have an Action againſt another for riding over his Ground, though it do him no Damage; for it is an Invaſion of his Property, and the other has no Right to come there. And in theſe Caſes the Action is brought *Vi et Armis*. But for the Invaſion of another's Franchiſe, Treſpaſs *Vi et Armis*, does not lie; but an Action of Treſpaſs on the Caſe; as where a Man has *Retorna Brevium*, he ſhall have an Action againſt any one who enters and invades his Franchiſe, though he loſe nothing by it. So here in the principal Caſe, the Plaintiff is obſtructed of his Right, and ſhall therefore have his Action. And it is no Objection to ſay, that it will occaſion Multiplicity of Actions; for if Men will multiply Injuries, Actions muſt be multiplied too; for every Man that is injured ought to have his Recompence. Suppoſe the Defendant had beat forty or fifty Men, the Damage done to each

one is peculiar to himſelf, and he ſhall have his Action. So if many Perſons receive a private Injury by a public Nuſance, every one ſhall have his Action, as is agreed in *Williams*'s Caſe, 5 *Co.* 73. *a.* and *Weſtbury* and *Powell*, *Co. Li.* 56. *a.* Indeed, where many Men are offended by one particular Act, there they muſt proceed by Way of Indictment, and not of Action; for in that Caſe the Law will not multiply Actions. But it is otherwiſe, when one Man only is offended by that Act, he ſhall have his Action; as if a Man dig a Pit in a Common, every Commoner ſhall have an Action on the Caſe, *per quod Communiam ſuam in tam amplo Modo habere non potuit*; for every Commoner has a ſeveral Right. But it would be otherwiſe, if a Man dig a Pit in an Highway, every Paſſenger ſhall not bring his Action, but the Party ſhall be puniſhed by Indictment; becauſe the Injury is general and common to all that paſs. But when the Injury is particular and peculiar to every Man, each Man ſhall have his Action. In the Caſe of *Turner* againſt *Sterling*, the Plaintiff was not elected, he could not give in Evidence, the Loſs of his Place as a Damage, for he was never in it, but the *Git* of the Action is, that the Plaintiff having a Right to ſtand for the Place, and it being difficult to determine who had the Majority, he had therefore a Right to demand a Poll, and the Defendant by denying it, was liable to an Action. If public Officers will infringe Men's Rights, they ought to pay greater Damages than other Men, to deter and hinder other Officers from the like Offences. So the Caſe of *Hunt* and *Downan*, *Cro. Jac.* 478. where an Action on the Caſe is brought by him in Reverſion againſt Leſſee for Years, for refuſing to let him enter into the Houſe, to ſee whether any Waſte was committed. In that Caſe the Action was not founded on the Damage, for it did not appear that any Waſte was done, but becauſe the

Plaintiff was hindered in the Enjoyment of his Right, and ſurely no other Reaſon for the Action can be ſuppoſed.

But in the principal Caſe, my Brothers ſay, we cannot judge of this Matter, becauſe it is a parliamentary Thing. O! by all Means be very tender of that. Beſides it is intricate, and there may be Contrariety of Opinions. But this Matter can never come in Queſtion in Parliament; for it is agreed, the Perſons for whom the Plaintiff voted were elected, ſo that the Action is brought for being deprived of his Vote: And if it were carried for the other Candidates againſt whom he voted, his Damage would be leſs. To allow this Action, will make public Officers more careful to obſerve the Conſtitutions of Cities and Boroughs, and not to be ſo partial as they commonly are in all Elections, which is indeed a great and growing Miſchief, and tends to the Prejudice of the Peace of the Nation. But they ſay, that this is a Matter out of our Juriſdiction, and we ought not to inlarge it. I agree we ought not to incroach or inlarge our Juriſdiction; by ſo doing, we uſurp both on the Right of the Queen and the People: But ſure we may determine on a Charter granted by the King, or on a Matter of Cuſtom or Preſcription, when it comes before us, without incroaching on the Parliament. And if it be a Matter within our Juriſdiction, we are bound by our Oaths to judge of it. This is a Matter of Property determinable before us. Was ever ſuch a Petition heard of in Parliament, as that a Man was hindered in giving his Vote, and praying them to give him Remedy? The Parliament would undoubtedly ſay, take your Remedy at Law. It is not like the Caſe of determining the Right of Election between the Candidates.

My

My Brother *Powell* ſays, that the Plaintiff's Right of Voting ought firſt to have been determined in Parliament, and to that Purpoſe cites the Opinion of my Lord *Hobart* 318. that the Patron may bring his Action upon the Caſe againſt the Ordinary after a Judgment for him in *quare impedit*, but not before. It is indeed a fine Opinion, but I do not know whether it will bear debating, and how it will prove, when it comes to be handled. For at Common Law, the Patron had no Remedy for Damages againſt the Diſturber, but the Statute gives him Damages; but if he will not make the Biſhop a Party to the Suit, he has loſt his Remedy which the Statute gives him. But in our Caſe the Plaintiff has no Opportunity to have a Remedy elſewhere. My Brother *Powys* has cited the Opinion of *Littleton* on the Statute of *Merton*, that no Action lay upon the Words, *ſi Parentes conquerantur*, becauſe none had ever been brought, yet he cannot depend upon it. Indeed that is an Argument, when it is founded upon Reaſon, but it is none when it is againſt Reaſon. But I will conſider the Opinion. Some Queſtion had aroſe on the penning of that Statute on thoſe Words, *ſi Parentes conquerantur, &c.* what was the Meaning of them, whether they meant a Complaint in a Court in a judicial Manner. But it is plain, the Word *conquerantur* means only, *ſi Parentes lamententur*, that is, only a Complaint *in Pais*, and not in a Court; for the Guardian in Socage ſhall enter in that Caſe, and ſhall have a ſpecial Writ, *de Ejectione Cuſtodiæ Terræ et Hæredis*, but this ſaying has no great Force, if it had, it would have been deſtructive of many new Actions, which are at this Day held to be good Law. The Caſe of *Hunt* and *Dowman* before-mentioned, was the firſt Action of that Nature, but it was grounded on the Common Reaſon, and the antient Juſtice of the Law. So the Caſe of *Turner* and *Sterling*. Let us conſider wherein

the Law consists, and we shall find it to be, not in particular Instances and Precedents, but on the Reason of the Law, and *ubi eadem Ratio, ibi idem Jus*. This Privilege of Voting does not differ from any other Franchise whatsoever. If the *House of Commons* do determine this Matter, it is not that they have an original Right, but as incident to Elections. But we do not deny them their Right of examining Elections, but we must not be frighted when a Matter of Property comes before us, by saying, it belongs to the Parliament; we must exert the Queen's Jurisdiction. My Opinion is founded on the Law of *England*. The Case of *Mors* and *Slue*, *Ventr.* was the first Action of that Nature, but the Novelty of it was no Objection to it. So the Case of *Smith* and *Crashaw*, *Cro.* 15. *W. Jones* 93. that an Action of the Case lay for falsly and maliciously indicting the Plaintiff of Treason, though the Objections were strong against, yet it was adjudged, that if the Prosecution were without probable cause, there was as much Reason the Action should be maintained, as in other Cases. So 15 *Car.* 2. *C. B.* between *Bodily* and *Long*, it was adjudged by *Bridgman*, Chief Justice, *&c.* that an Action on the Case lay for a Riding, whenever the Plaintiff and his Wife fought, for it was a scandalous and reproachful Thing. So in the Case of *Herring* and *Finch*, 2 *Lev.* 250. Nobody scrupled, but that the Action well lay, for the Plaintiff was deprived of his Right. And if an Action is maintainable against an Officer for hindering the Plaintiff from voting for a Mayor of a Corporation, who cannot bind him in his Liberty nor Estate, to say, that yet this Action will not lie in our Case, for hindering the Plaintiff to vote at an Election of his Representative in Parliament, is inconsistent, therefore my Opinion is, that the Plaintiff ought to have Judgment.

Fri-

Friday, the *fourteenth* of *January*, 1703, this Judgment was reverſed in the *Houſe of Lords*, and Judgment given for the Plaintiff, by fifty Lords againſt ſixteen. *Trevor*, Chief Juſtice, and Baron *Price*, were of Opinion with the three Judges of the *King's-Bench*. *Ward*, C. B. and *Bury* and *Smith* Barons, were of Opinion with the Lord Chief Juſtice *Holt*, *Tracy dubitante*, *Nevill* and *Blencowe* abſent.

(Note, Lord Chief Juſtice [1] *Raymond* had it from good Hands, that *Tracy* agreed clearly, that the Action lay, but was doubtful upon the Manner of laying the Declaration.)

Upon the Arguments of this Caſe, *Holt*, Chief Juſtice ſaid, the Plaintiff had a particular Right veſted in him to vote, was it not then a Wrong and Injury to that Right, to refuſe to receive his Vote? So if a Borough has Right of Common, and the Freemen are hindered from enjoying it by Incloſure, or the like, every Freeman may maintain his Action. This Action is brought by the Plaintiff for the Infringement of his Franchiſe. You would have nothing to be a Damage, but what is pecuniary, and a Damage to Property. If a Man has a *Returno Brevium*, although no Fees were due to him at Common Law, yet if the Sheriff enters within his Liberty, and executes Proceſs there, it is an Invaſion of his Franchiſe, and he may bring his Action; and there is the ſame Reaſon in this Caſe, although this Matter relates to Parliament, yet it is an Injury precedaneous to the Parliament, as my Lord *Hale* ſaid in the Caſe of *Bernardiſton* and *Soame*. The Parliament cannot judge of this Injury, nor give Damage to the Plaintiff for it: They cannot make him a Recompence. Let all People come in, and vote fairly; it is to ſupport one or the other Party, to deny any Man's Vote. By my Conſent, if ſuch an Action comes to be tried

[1] Lord *Raym.* Rep. 2 Vol. P. 958.

before me, I will direct the Jury to make him pay well for it; it is denying him his *English* Right, and if this Action be not allowed, a Man may be for ever deprived of it. It is a great Privilege to chuse such Persons, as are to bind a Man's Life and Property by the Laws they make.

Paty[h] and [i] four others, being committed by the Speaker of the *House of Commons*, by Virtue of an Order of that House; moved for an *Habeas Corpus* to bring them before the Court of *Queen*'s *Bench*, the Warrant was returned, which follows *in hæc Verba*: *Martis 5 die Decembris* 1704. By Virtue of an Order of the *House of Commons* of *England*, in Parliament assembled, this Day made, these are to require you forthwith, upon Sight hereof, to receive into your Custody the Body of *John Paty*, who, as it appears to the *House of Commons*, is guilty of commencing and prosecuting an Action at Common Law, against the late Constables of *Aylesbury*, for not allowing his Vote in the Election of Members to serve in Parliament, contrary to the Declaration, in high Contempt of the Jurisdiction, and in Breach of the known Privileges of this House; and him in safe Custody to keep, during the Pleasure of the said *House of Commons*; for which this shall be your Warrant. Given under my Hand this *fifth* of *December*, *Anno Domini* 1704. To the Keeper of his Majesty's Gaol of *Newgate*, or his Deputy. The Warrant was signed *Robert Harley*. This *Habeas Corpus* was moved for on the last *Monday* but one in *Hilary* Term, 1704, 3 *Anne*, and the Court granted the Writ returnable the *Saturday* after. Some Persons thought the Return too long, and the Court were much pressed to make it shorter; but the Court would not, but said, that in a Case of this

[h] Lord *Raym.* Rep. 2 Vol. P. 1105, 1106.

[i] *Viz. John Oviat*, *John Paton*, Jun. *Henry Basse*, and *Daniel Horn* of *Aylesbury*. *Boyer*'s Hist. of Queen *Anne*, P. 170.

this Conſequence, they ought to give the Parties concerned Time to conſider what Return to make, and if there were any Delay, the Parties were the Cauſe of it themſelves, by not moving ſooner. The Defendants were brought up upon the *Saturday*, and Mr. [k] *Mountague*, Mr. [l] *Page*, Mr. [m] *Lechmere*, and Mr. [n] *Denton*, argued that they ought to be diſcharged. There were no Council to maintain the Commitment. The Court put off delivering their Opinion till *Monday*, which was the laſt Day of *Hilary* Term, 1704, 3 *Anne*, and then all *Seriatim* delivered their Opinions.

Holt,

[k] He was of *Lincoln's-Inn*, and afterwards knighted and appointed one of Queen *Anne's* Council. Lord *Raym.* Rep. 2 Vol. P. 1261. 25 *Apr.* 1707, 6 *Anne*, he was appointed Solicitor General; and 21 *Oct.* 1708, Attorney General. *Stil. Reg.* P. 160, 161. *Burnet's* Hiſt. own Times, 2 Vol. P. 553. On *Tueſday*, 26 *Oct.* 1714, 1 *Geo.* 1. he was made a Serjeant at Law, and gave Rings with this Motto; *plus quam ſperavimus*. Lord *Raym.* Rep. 2 Vol. P. 1261. Append. to *Chron. Juridicial.* P. 11. On *Monday*, *Nov.* 22d following, he was ſworn a Baron of the *Exchequer*, and his Salary encreaſed from 1000*l.* to 1500*l.* *per Annum*, for which he had a diſtinct Patent from that, by which he was appointed a Baron. Lord *Raym.* Rep. 2 Vol. P. 1319. Append. to *Chron. Juridicial.* P. 11. He took his Seat as Chief Baron of the *Exchequer*, on the *twenty fifth* Day of *May*, in the Year 1722. *Bunbury's* Rep. P. 110. Append. to *Chron. Juridicialia.* P. 15. ¶

[l] He was afterwards knighted and made a Serjeant to Queen *Anne*, 26 *Jan.* 1714. He ſucceeded Mr. Baron *Forteſcue*, who came down into the *King's-Bench*, in *Eaſter* Term, 4 *Geo.* 1. 1716. *Stra.* Rep. P. 86. *Bunb.* Rep. P. 22. Append. to *Chron. Jurid.* P. 13. On *Friday*, the *fourth* Day of *November*, 13 *Geo.* 1. 1726, he was ſworn Judge of the *Common Pleas*, in the Room of Mr. Juſtice *Tracy*. Lord *Raym.* Rep. 2 Vol. P. 1420. Append. to *Chron. Juridicial.* P. 15. as one of the Judges of the Court of *King's-Bench*, in *Michaelmas* Term, 1 *Geo.* 2. 1728. *Stra.* Rep. 2 Vol. P. 781. Append. to *Chron. Juridicial.* P. 17.

[m] Afterwards Solicitor [Lord *Raym.* Rep. 2 Vol. P. 1318.] and Attorney General to his late Majeſty King *George* the *firſt*. *Stra.* Rep. P. 86.

[n] He was conſtituted one of the Juſtices of the *Common Pleas*, 25 *June*, 1722. Append. to *Chronica Juridicial.* P. 15.

Holt, Chief Justice, argued to the following Effect.

[a] He said, That the Legality of the Commitment depended upon the Vote recited in the Warrant, and, for his Part, he thought the Prisoners ought to be discharged, though in this, his Opinion, he was so unfortunate as to go contrary to the *House of Commons*, and the Opinion of all the Rest of the Judges of *England*, whose Assistance they had desired, and there had been a Meeting for that Purpose. He said, this was not such an Imprisonment as the Freemen of *England* ought to be bound by; for that this, which was only doing a legal Act, could not be made illegal by the Vote of the *House of Commons*; for that neither House of Parliament, nor both Houses jointly, could dispose of the Liberty or Property of the Subject; for to this Purpose the Queen must join: And that it was the Necessity of their several Concurrences to such Acts, that the great Security of the Liberty of the Subject consisted. He said, that the first Matter, which was laid as a Breach of Privilege was none: And to that Purpose he cited *Binyon*'s Case, where, in an *Assumpsit*, the Defendant pleaded the Statute of Limitations, and the Plaintiff replied, that the Defendant was a Parliament Man, *&c.* and the Plea was over-ruled, because one might file an Original against a Parliament Man, and continue it down, without Breach of Privilege. And that it should be so is of absolute Necessity, in order to save the Statute of Limitations; for otherwise, as is held in that Case in *Lev.* 111. that Case not being provided for by an Exception, the Plaintiff would be barred of his Action, notwithstanding that he could not file an Original. So a Man, whilst Member of Parliament, may alien his Estate by Fine with Proclamations, and a Person that has Right may be ne-

[a] Lord *Raym.* Rep. 2 Vol. P. 1112. Cas. Tem. *Holt*, P. 526. pl. 4. *Salk.* Rep. 2 Vol. P. 504. pl. 2.

ſubſtituted to commence an Action to ſave the Bar that would incur againſt him by the Statute of 4 *Hen.* 7. So one may commence an Action againſt a Member of Parliament, that is Executor; and conſequently the commencing an Action againſt the Conſtables of *Ayleſbury*, is no Breach of Privilege. As to proſecuting the Action, which was the ſecond Matter; he ſaid, it was uncertain what Sort of proſecuting they meant. For proſecuting might be only continuing the Original, which, as was ſaid before, would be no Breach of Privilege, though taking out a *Capias*, or a *Diſtringas* would. The third Thing is, the Perſons the Action is brought againſt, *viz.* the Conſtables of *Ayleſbury*; now it does not appear, that the Conſtables of *Ayleſbury* have any Privilege, and if they have any, it ought to have been ſet out, becauſe as Conſtables of *Ayleſbury*, they have no more Privilege than the Conſtables of St. *Martin's in the Fields*. The fourth Matter, he ſaid, was for bringing an Action at Common Law, for not allowing his Vote in the Election of Members to ſerve in Parliament. Now to bring an Action againſt a Perſon, who is not privileged, he ſaid was no Offence, though no Action would lie in this Caſe, or though the Matter upon which the Action was grounded was falſe. And ſo is 2 *R.* 3. 9. And if a Peer be charged with any falſe and ſcandalous Matter, yet if it be by Way of Action, he cannot have *Scandalum Magnatum*. A Man who brings an Action againſt another, who is not a privileged Perſon, is not to have his Action ſtopped, eſpecially if he has a good Cauſe of Action, which that the Plaintiffs in this Caſe have, appears by the Reverſal of the Judgment of this Court *in Domo Procerum*, in the Caſe of *Aſhby* and *White*. And this Action, which was brought in this Caſe, appears by the Deſcription of it in the Vote of the *Houſe of Commons*, to be for the ſame Cauſe of Action that that was.

I will ſuppoſe, that the bringing ſuch Actions was declared by the *Houſe of Commons* to be a Breach of Privilege; but that Declaration will not make that a Breach of Privilege that was not ſo before. But if they have any ſuch Privilege, they ought to ſhew Precedents of it. The Privileges of the *Houſe of Commons* are well known, and are founded upon the Law of the Land, are nothing but the Law. As we all know they have no Privilege in Caſes of Breach of the Peace. And if they declare themſelves to have Privileges, which they have no legal Claim to, the People of *England* will not be ſtopped by that Declaration. This Privilege of theirs concerns the Liberty of the People in an high Degree, by ſubjecting them to Impriſonment for the Infringement of them, which is what the People cannot be ſubjected to without an Act of Parliament. As to what was ſaid, that the *Houſe of Commons* are Judges of their own Privileges, he ſaid, they were ſo, when they come before them. And as to the Inſtances cited, where the Judges have been cautious in giving any Anſwer in Parliament in Matters of Privilege of Parliament; he ſaid, the Reaſon of that was, becauſe the Members know probably their own Privileges better than the Judges. But when a Matter of Privilege comes in Queſtion in *Weſtminſter-hall*, the Judges muſt determine it as they did in *Binyon*'s Caſe. Suppoſe theſe Actions againſt the Conſtables of *Ayleſbury* had gone on, and the Defendants had pleaded this Privilege; we muſt have determined, whether there were any ſuch Privilege or no. And we may as well determine it upon the Return of this *Habeas Corpus*, for the Defendants are in a proper Courſe of Law, and the Matter appears to us upon Record, as well this Way, as if it was pleaded to an Action. We muſt take Notice of the *Lex Parliamenti*: My Lord *Coke*, in his 1 *Inſt.* 11. *b.* enmerates the ſeveral that are within this Realm, and

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the *Lex Parliamenti* is one of them, and the *Lex Parliamenti* is the Law of the Land. As to what my Lord *Coke* ſays in the ſame Place, that the *Lex Parliamenti eſt a multis ignota*, that is, becauſe they will not apply themſelves to underſtand it. He gave a great *encomium* of my Lord *Clarendon*, and cited a Paſſage out of his Hiſtory, relating to the ſame Doctrine with this, that was then ſet up, that the *Houſe of Commons* were the only Judges of their own Privileges, and therefore whatever they ſaid was their Privilege, was ſuch: It is in his firſt Part, Fol. 310, *&c.* and is very applicable to the preſent Caſe, but too long to be tranſcribed. He ſaid, he would cite a greater Author than he, King *Charles* the *firſt*, in his Anſwer to the Declaration and Votes of the two Houſes concerning *Hull*, *Clarendon*, 1 Part, 399, 400, and *Ruſhworth's Collections*, [3 Vol. P. 438, 725, 730.] wherein among other Things he ſays, he very well knew the great and unlimited Power of a Parliament, but he knew as well, it was only in that Senſe, as he was a Part of that Parliament, without him, and againſt his Conſent, the Votes of either, or both Houſes together muſt not, could not, (ſhould not if he could help it, for his Subject's Sake as well as his own) forbid any Thing that was injoined by the Law, or injoin any Thing that was forbidden by the Law. And the Chief Juſtice ſaid, if the Votes of both Houſes could not make a Law, by Parity of Reaſon they could not declare Law. That the bringing this Action is no Breach of the Privilege of the *Houſe of Commons*, appears by the Judgment in the Caſe of *Aſhby* and *White*, in the Argument of which Caſe before the *Houſe of Lords*, this Argument of Privilege of the *Houſe of Commons* was inſiſted on. Beſides, if the bringing this Action was a Breach of the Privilege of the *Houſe of Commons*, why was not *Aſhby* committed, when he firſt brought the Action? But the ſuffering him

him to go on with his Action is an Argument, that this Pretence of Privilege is a new Thing. *Ashby* recovered in his Action, and these Men have followed his Steps, and yet they are here said to have acted in Breach of the Privilege of the *House of Commons*. I shall say nothing to the Case of *Ashby* and *White*, because the Reasons upon which that Judgment was given are [p] printed. He said, the bringing this Action is said to be in high Contempt of the Jurisdiction of the *House of Commons*; but that he said could not be, because neither House of Parliament could hold Ples in any Action; and besides, the Defendants might waive their Privilege. He said, he made no Question of the Power of the *House of Commons* to commit; they might commit any Man for offering an Affront to a Member, or for a Breach of Privilege; nay they might commit for a Crime, because they might impeach. He said, my Lord *Shaftesbury*'s Case differed from this, because the Commitment there was for a Contempt done in the House. He said, the Cause of the Prisoner's Commitment being expressed in the Warrant, excluded any Intendment, that they might be committed for any other Cause than that expressed in the Warrant. He said, both Houses of Parliament were bound by the Law of the Land, and in their Actions were obliged to prove it. He cited my Lord [q] *Banbury*'s Case, which, he said, would go a great Way in this. Though his Lordship's [r] Judgment was clear, solid, and convincing, yet the other Judges being of a [s] contrary Opinion, there was but one against

[p] See his Lordship's excellent Argument in this Case, P. 74.

[q] See it here at large, in P.

[r] *Boyer*'s History of Queen *Anne*, P. 172. *Burnet*'s Hist. of his own Times, 2 Vol. P. 408.

[s] *Burnet* as above.

gainſt three, and the Majority prevailed, therefore the Priſoners were remanded to *Newgate*.

This Affair made great Noiſe, and the heroical Reſolution of the Lord Chief Juſtice was no leſs applauded than his Integrity, Penetration, and Learning univerſally acknowledged.

In *Hilary* Term, 5 *Anne*, 1706, the Chief Juſtice gave the Opinion of the Court in another Crown Caſe, of very great Conſequence, which Mr. Juſtice [u] *Foſter* ſays, the Chief Juſtice publiſhed, wherein, ſays [w] he, the learned Judge (Lord Chief Juſtice *Holt*,) after a ſhort introductory Diſcourſe, in which he cannot totally agree with him, entereth with great Learning and ſound Reaſon, into the Point upon which the Caſe turned. He further [x] adds, that the Judgment in this Caſe was held to be good Law by all the Judges of *England*, in the Caſe of Major [y] *Oneby*. The firſt mentioned Caſe was as follows:

At the Seſſions of [z] the Peace held at *Guildhall*, *London*, on the *firſt* of *July*, 1706, in the *fifth* Year of Queen *Anne*, *John Mawgridge* of *London*, Gent. was indicted, for that on the *ſeventh* of *June*, in the ſame Year, he did felonioufly, voluntarily, and of his Malice fore-thought, make an Aſſault upon *William Cope*, Gent. and with a Sword, on the left Part of his Breaſt, near the left Pap, did him ſtrike and pierce, giving him thereby a mortal Wound, of which he, the ſaid *William Cope*, did inſtantly die. Which Indictment being delivered to the Juſtices of the Goal Delivery for *Newgate*, he was arraigned thereupon, and pleaded not Guilty.

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[z] *Boyer*, Ib.
[u] *Foſt.* Cr. Law, P. 204.
[w] Id. P. 296. Note *.
[x] Id. ib.
[y] Lord *Raym.* Rep. 2 Vol. P. 1489.
[z] *Kely*, Rep. P. 119.

The Jury found this ſpecial Verdict:

That *William Cope* was Lieutenant of the Queen's Guards in the *Tower*, and the principal Officer then commanding there, and was then upon Guard in the Guard-room; and that *John Mawgridge* was then, and there, by the Invitation of Mr. *Cope*, in Company with the ſaid *William Cope*, and with a certain Woman of Mr. *Cope*'s Acquaintance, which Woman *Mawgridge* did then Affront, and angry Words paſſed between them in the Room, in the Preſence of Mr. *Cope*, and other Perſons there preſent, and *Mawgridge* there did threaten the Woman; Mr. *Cope* did thereupon deſire *Mawgridge* to forbear ſuch Uſage of the Woman, ſaying, that he muſt protect the Woman, thereupon *Mawgridge* did continue the reproachful Language to the Woman, and demanded Satisfaction of Mr. *Cope*, to the Intent to provoke him to fight; thereupon Mr. *Cope* told him, it was not a convenient Place to give him Satisfaction, but at another Time and Place he would be ready to give it him, and in the mean Time deſired him to be more civil, or to leave the Company; thereupon *John Mawgridge* roſe up, and was going out of the Room; and ſo going, did ſuddenly ſnatch up a Glaſs-bottle, full of Wine, then ſtanding upon the Table, and violently threw it at him, the ſaid Mr. *Cope*, and therewith ſtruck him upon the Head, and immediately thereupon, without any Intermiſſion, drew his Sword, and thruſt him into the left Part of his Breaſt, over the Arm of one *Robert Martin*, notwithſtanding the Endeavour uſed by the ſaid Mr. *Martin* to hinder *Mawgridge* from killing Mr. *Cope*, and gave Mr. *Cope* the Wound in the Indictment mentioned, whereof he inſtantly died. But the Jury do farther ſay, that immediately in a little Space of Time, between *Mawgridge*'s drawing his Sword, and the giving the mortal Wound by him, Mr. *Cope* did

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riſe from his Chair where he ſat, and took another Bottle that then ſtood upon the Table, and threw it at *Mawgridge*, which did hit and break his Head; that Mr. *Cope* had no Sword drawn in his Hand all the while; and that after *Mawgridge* had thrown the Bottle, Mr. *Cope* ſpake not. And whether this be Murder or Manſlaughter, the Jury pray the Advice of the Court.

A Day being appointed for the Reſolution of the Court, and the Marſhal required to bring the Priſoner to the Bar, returned he was eſcaped; which being recorded, the Chief Juſtice gave the Opinion of the Court in this Manner:

This Record being removed into this Court, the Caſe hath been argued before all the Judges; and all of us, except my Lord Chief Juſtice *Trevor*, are of Opinion that *Mawgridge* is guilty of Murder.

This hath been a Caſe of great Expectation.

This Diſtinction between Murder and Manſlaughter only, is occaſioned by the Statute of 23 *H.* 8. Cap. 1. S. 3. and other Statutes that took away the Benefit of Clergy from Murder committed by Malice prepenſed, which Statutes have been the Occaſion of many nice Speculations.

The word Murder is known to be a Term or a Deſcription of Homicide committed in the worſt Manner, which is no where uſed but in this Iſland, and is a Word framed by our *Saxon* Anceſtors, in the Reign of *Canutus*, upon a particular Occaſion, which appears by an unconteſted Authority, *Lamb.* 141. In the Laws of *Edward* the Confeſſor: [b] *Murdra quidem inventa fuerunt in Diebus Canuti Regis, qui poſt acquiſitam*

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[a] Caſ. *Temp. Holt*, P. 484. pl. 5.

[b] See *Wilkin's Leges Anglo-Saxonicæ*, P. 202. pl. 16. *Bracton*, *Lib.* 3. *de Coronâ*, *Cap.* 15. No. 2, 3. Fol. 134 *b.*

tam Angliam & pacificatam, Regatu Baronum Angliæ remisit in Daciam Exercitum suum. Whereupon a Law was made, That if any *Englishman* should kill any of the *Danes* that he had left behind, if he were apprehended, he should be bound to undergo the *Ordeal* Trial to clear himself; and if the Murderer were not found within eight Days, and after that a Month was given, then if he could not be found, the Ville should pay forty six Marks, which if not able to pay, it should be levied upon the Hundred. *Bracton* 120, agrees with this Account.

Though this Law ceased upon the Expulsion of the *Danes*, yet *William* the Conqueror revived it for the Security of his *Normans*, as appears by his Laws, after he had confirmed King *Edward* the Confessor's Laws. *Henry* the *first*, *Anno primo Regni*, afterwards by his Law (as appears in the Addition to [c] *Lambert*) establishes, That if a Man be found slain, he should be taken to be a *Frenchman*, if it was not proved that he was an *Englishman*, and the Country was bound to enquire whether the Person slain was an *Englishman*, or a *Frenchman*. These Inquisitions were taken before the Coroner, and returned to the Justices in *Eyre*, and if the Jury found him an *Englishman*, then the Country was to be discharged, which Law was called *Englishire*, and the Justices in *Eyre* were also bound to enquire thereof, until the Statute of 14 *E.* 3. Cap. 4. which, as it is mentioned in *Stamford*, was abolished.

Hereby a Mistake, upon the Statute of *Marlebridge*, is rectified, which is Cap. 26. *Murdrum, cætera non adjudicatur coram Justiciariis, ubi per Infortunium adjudicatum est, sed Locum habeat Murdrum de interfectis per Feloniam tantum, & non aliter.*

This was not made upon a Supposition, that he that killed the Person, slain by Misfortune, should be hang-

[c] See *Wilk. Leg. Angl. Sax.* P. 280.

hanged, but only to explain, or rather to take off the Rigor of the Conquerour's Law, that the Country ſhould not be compelled to find out the Manſlayer; or if he were found out, he ſhould not undergo the Penalty of that Law. For as the Law ſtood, or was interpreted before that Statute, if a Man was found to be ſlain, it was always intended, 1. That he was a *Frenchman*. 2. That he was killed by an *Engliſhman*. 3. That Killing was Murder. 4. If any one was apprehended to be the Murderer, he was to be tried by Fire and Water, though he killed him by Misfortune; which was extended beyond Reaſon and Juſtice, in Favour of the *Normans*: But if an *Engliſhman* was killed by Misfortune, he that killed him was not in Danger of Death, becauſe it was not Felony. For ſaith *Bracton*, (who wrote the latter End of *H.* 3.) Fol. 136. He that killed a Man by Misfortune, was to be diſcharged. 5. If the Malefactor was not taken, then the Country was to be amerced. But by the Statute of *Marlebridge*, if it was known that the Priſoner ſlain was a *Frenchman*, and was killed by Misfortune, then the Country ſhould not be amerced if the Manſlayer was not taken; or if he were taken, he ſhould not be put to his *Ordeal* Trial. This ſeems to be the true Meaning of that Statute.

But, ſecondly, it will appear to a Demonſtration, that before that Statute, he that killed an *Engliſhman*, *per Infortunium*, was never in Danger of Death; for this Statute of *Marlebridge*, was made 52 *H.* 3. The Statute of *Magna Charta* was conſummate, 9 *H.* 3. and that ſuppoſes, That every one impriſoned for the Death of a Man, and not thereof indicted, might of Right purſue the Writ, *de Odio & Atia*; and if it was found that the Perſon impriſoned killed him, *ſe defendendo*, or *per Infortunium*, and not *per Feloniam*, then he was to be bailed, which ſhews, that he was

not in Danger of Death; for if he had, he would not have been let to bail.

Hereby I have given a true Account of the Senſe of the Word Murder, that it was when (firſt in the Time of *Canutus*) a *Dane*, and ſince (in *William* the Conqueror) when a *Frenchman* was killed, for, as it was then ſuppoſed in the Time of *Canutus*, the *Engliſhmen* hated the *Danes* upon Account of their Nation that had ſubdued them, and would, upon all Occaſions, ſeek their Deſtruction, as they did of a conſiderable Number of them in the Time of *Ethelred* the *Saxon* King, that preceded *Canutus* next, ſave one; ſo the Conqueror had the ſame Reaſon to ſuſpect the Safety of his *Normans*.

Afterwards, as appears by the Confeſſor's Laws, *Lamb.* 141. the ſecret or inſidious killing of any other, as well as a Foreigner, was declared to be Murder. *Bracton* 120, 134, 135. Murder is thus defined, *eſt occulta Hominum extraneorum & notorum Occiſio Manu Hominum nequitur perpetrata.* With which agrees the other old Books of *Britton* and *Fleta*: Only in Caſe of a Foreigner it was penal to the Country, not of a Native.[d]

Next, it may be neceſſary to ſhew what was to be underſtood by Homicide or Manſlaughter. *Bracton* 120, 121. mentioning the worſt Part of it, which is a voluntary Homicide, defined in this Manner: *Si quis ex certâ Scientiâ & in Aſſultu præmeditato, Irâ, vel Odio, vel Cauſâ Lucri, nequiter & in Feloniâ, ac contra Pacem Domini Regis aliquem interfecerit.* If one unknowingly, and by a premeditated Aſſault, by Anger or Hatred, or for Lucre-ſake, ſhould kill another, this was accounted Manſlaughter; if it be done *clanculo*, ſaith *Bracton*, it is Murder: That was all the Difference there was between the one and the other.

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[d] See *Wilk. Lg. Angl. Sax.* P. 280. Note (k).

It appears, that ſince that of *Bracton*, the Notion of Murder is much altered, and comprehends all Homicides, whether privately or publicly committed, if done by Malice prepenſed. With this agrees *Stam.* Pl. Cor. 18. *b.* At this Day (ſaith he) a Man may define Murder in another Manner than it is defined by *Bracton*, *Britton* and *Fleta:* If any one of Malice prepenſed doth kill, be he *Engliſhman* or Foreigner, if ſecretly or publicly, that is Murder; this was the Definition long before the making of the Statutes of 4 *H.* 8. Cap. 2. 23 *H.* 8. Cap. 1. and the other Statutes that took away Clergy. To define Murder, there muſt be *Malitia præcogitata*, as alſo *murdravit:* So that if an Indictment be that the Party *murdravit*, and not *ex Malitiâ præcogitatâ*, it is but Manſlaughter. So if it be *ex Malitiâ præcogitatâ*, omitting *murdravit*, it is but Manſlaughter. The Parliament complained, that Murderers, *&c.* were encouraged to offend, becauſe Pardons of Manſlaughterers were granted ſo eaſily; the Act therefore prohibits the Granting thereof. 13 *R.* 2. St. 2. Cap. 1. recites the ſame Miſchief and great Damage by Treaſons, Murders, *&c.* becauſe Pardons have been eaſily granted: Therefore the Act doth provide, That if a Charter for the Death of a Man be alledged before any Juſtice, in which Charter it is not ſpecified, that he, of whoſe Death any ſuch is arraigned, was murdered or ſlain by Await, Aſſault, or Malice prepenſed, it ſhall be enquired whether he was murdered, or ſlain by Aſſault, Await, or Malice prepenſed; and if it be ſo found, the Charter of Pardon ſhall be diſallowed. This is a plain Deſcription of Murder, as it was taken to be according to the common Underſtanding of Men.

Ever ſince the killing of a Man by Aſſault of Malice prepenſed hath been allowed to be Murder, and to comprehend the other two Inſtances. But becauſe

that Way of Killing, by Poiſon, did not come under the antient Definition of *Bracton*, &c. which is ſaid to be *Manu Hominum perpetrata*, or of this Statute of 13 *R.* 2. St. 2. Cap. 1. Therefore, by the Statute of 1 *E.* 6. Cap. 12. it was enacted, That wilful poiſoning of any Perſon ſhould be accounted wilful Murder of Malice prepenſed.

One Thing more is fit to be obſerved, that in all Indictments for Murder, a Man is not charged poſitively, that he did murder the Perſon ſlain, but that he *ex Malitiâ præcogitatâ, in ipſum Inſultum fecit, ac cum quodam Gladio*, he gave him a Wound whereof he died: *Et ſic ex Malitiâ præcogitatâ ipſum murdravit*; ſo the Murder is charged upon him by Way of Concluſion, and as a Conſequence from the antecedent Matter that is poſitively alledged. To come cloſe to a State of the preſent Queſtion, it doth appear, that *Mawgridge* threw the Bottle at Mr. *Cope*, without any Provocation given him; for the Difference was between him and the Woman that was there in Company, and his Behaviour was ſo rude and diſtaſtful, as did induce Captain *Cope* to deſire him to leave the Room, where he was only a Gueſt to him, and there, by his Permiſſion; this *Cope* might reaſonably do, which could be no Cauſe to provoke *Mawgridge* to make the leaſt Aſſault upon him: Therefore I ſhall maintain theſe three Poſitions.

1. That in this Caſe there is expreſs Malice by the Nature and Manner of *Mawgridge*'s throwing the Bottle, and drawing his Sword immediately thereupon.

2. That Mr. *Cope*'s throwing a Bottle at *Mawgridge*, whereby he was hit and hurt before he gave Mr. *Cope* the mortal Wound, cannot make any Alteration in the Offence by reducing it to be of ſo low a Degree as Manſlaughter.

3. I

3. I ſhall conſider what is ſuch a Provocation as will make the Act of Killing to be but a Manſlaughter only.

1. Here is expreſs Malice, that appears by the Nature of the Action, ſome have been led into Miſtake by not well conſidering what the Paſſion of Malice is; they have conſtrued it to be a Rancour of Mind lodged in the Perſon killing, for ſome conſiderable Time before the Commiſſion of the Fact, which is a Miſtake ariſing from the not well diſtinguiſhing between Hatred and Malice. Envy, Hatred, and Malice, are three diſtinct Paſſions of the Mind.

1. Envy properly is a repining or being grieved at the Happineſs and Proſperity of another, * *Invidus alterius macreſcit Rebus opimis.*

2dly, Hatred, which is *odium*, is as *Tully* ſaith, *Ira inveterata*, a Rancour fixed and ſettled in the Mind of one towards another, which admits of ſeveral Degrees. It may arrive to ſo high a Degree, and may carry a Man ſo far as to wiſh the Hurt of him, though not perpetrate it himſelf.

3dly, Malice is a Deſign formed of doing Miſchief to another; *Cum quis datâ Operâ male agit*, he that deſigns and uſeth the Means to do ill is malicious, *Odium* ſignifies Hatred, *Atia* Malice, becauſe it is eager, ſharp, and cruel. He that doth a cruel Act voluntarily, doth it of Malice prepenſed, By the Statute of 5 *H.* 4. Cap. 5. if any one out of Malice prepenſed, ſhall cut out the Tongue, or put out the Eyes of another, he ſhall incur the Pain of Felony. If one doth ſuch a Miſchief on a ſudden, that is Malice prepenſed; for ſaith my Lord *Coke*, if it be voluntarily, the Law will imply Malice. Therefore when a Man ſhall, without any Provocation, ſtab another with a Dagger, or knock out his Brains with a

* *Horace* Epiſt. 2. Lib. 1. Line 57.

Bottle, this is expreſs Malice, for he deſignedly and purpoſely did him the Miſchief. This is ſuch an Act that is malicious in the Nature of the Act itſelf, if found by a Jury, though it be ſudden, and the Words *ex Malitiâ præcogitatâ* are not in the Verdict, *Cro. Car.* 131. *Holloway*'s Caſe, who was *Woodward* of *Auſterly* Park: A Boy came there to cut Wood, whom by Chance he eſpying, and the Boy being upon a Tree, he immediately calls to him to deſcend, which the Boy obeying, *Holloway* tied him to an Horſe's Tail with a Cord that the Boy had, then gave him two Blows, the Horſe run away and brake the Boy's Shoulder whereof he died. This was ruled to be Murder by all the Juſtices and Barons, except Juſtice *Hutton*, who only doubted thereof; and that was a ſtronger Caſe than this, for there was ſome Kind of Provocation in the Boy, who was ſtealing the Wood in the Park, of which *Holloway* had the Care; and it cannot be reaſonably thought that he deſigned more than the Chaſtiſement of the Boy, and the Horſe running away was a Surpriſe to *Holloway*; yet in Regard the Boy did not reſiſt him, his tying him to the Horſe-Tail was an Act of Cruelty, the Event whereof proving ſo fatal, it was adjudged to be Malice prepenſed, though of a ſudden, and in the Heat of Paſſion. This Caſe is reported in *Jones* 198. *Palm.* 585. and there held, that the Court could determine it to be Malice prepenſed upon the ſpecial Matter found. Two playing at Tables, fall out in their Game, one, upon a ſudden, kills the other with a Dagger: This was held to be Murder, by *Bromley*, at *Cheſter* Aſſizes, 27 *Eliz.* So in this Caſe, if the Bottle had killed Mr. *Cope*, before he had returned the Bottle upon *Mawgridge*, that would have been Murder without all Manner of Doubt.

In the ſecond Place, I come now to conſider, whether Mr. *Cope*'s returning a Bottle upon *Mawgridge* before

fore he gave him the mortal Wound with the Sword, ſhall have any Manner of Influence upon the Caſe: I hold not. Firſt, becauſe *Mawgridge*, by his throwing the Bottle, hath manifeſted a malicious Deſign. Secondly, his Sword was drawn immediately to ſupply the Miſchief which the Bottle might fall ſhort of. Thirdly, the throwing the Bottle by Captain *Cope* was juſtifiable and [f] lawful; and though he had wounded *Mawgridge*, he might have juſtified it in an Action of Aſſault and Battery, and therefore cannot be any Provocation to *Mawgridge* to ſtab him with his Sword. That the throwing the Bottle is a Demonſtration of Malice is not to be controverted; for if upon that violent Act he had killed Mr. *Cope*, it had been Murder. Now it hath been held, that if *A*, of his Malice prepenſed, aſſaults *B*, to kill him, and *B* draws his Sword and attacks *A*, and purſues him, then *A*, for his own Safety, gives back, and retreats to a Wall, *B* ſtill purſuing him with a drawn Sword, *A*, in his Defence, kills *B*. This is Murder in *A*, for *A* having Malice againſt *B*, and in Purſuance thereof, endeavouring to kill him, is anſwerable for all the Conſequences, of which he was the original Cauſe. It is not reaſonable for any Man that is dangerouſly aſſaulted, and when he perceives his Life in Danger from his Adverſary, but to have Liberty for the Security of his own Life, to purſue him that maliciouſly aſſaulted him; for he that hath manifeſted that he had Malice againſt another, is not fit to be truſted [g] with a dangerous Weapon in his Hand, and ſo reſolved by all the Judges, 18 *Car.* 2. when they met at *Serjeant's-Inn*, in Preparation for my Lord *Morley*'s Trial. If *A*, of Malice prepenſed, diſcharge a Piſtol at *B*, and then runs away, *B* purſues him, and *A* turns back, and in his

[f] See *Foſt.* Cr. Law, P. 274, 296.
[g] See *Foſt.* Cr. Law, P. 274, 275.

his own Defence kills *B*, it is Murder. This I hold to be good Law: For *A* had a malicious Intent against *B*, and his Retreat after he had discharged his Piſtol at *B*, was not becauſe he repented, but for his own Safety.

In a ſet Duel, there are mutual Paſſes made between the Combatants, yet if there be original Malice between the Parties, it is not the Interchange of Blows will make an Alteration, or be any Mitigation of the Offence of Killing. Therefore I hold, if *Mowgridge* had thrown the Bottle at Mr. *Cope*, and Mr. *Cope* had returned another upon him and hit him, and thereupon *Mowgridge* had drawn his Sword and killed Mr. *Cope*, it would have been Murder. Some will ſay, that there is a Difference between the Caſes, for that the Aſſault by the Piſtol, and the fighting a Duel was expreſs Malice, but this is only Malice implied. Surely there is no Difference, for Malice implied is prepenſed, as much as if there had been a Proof of Malice, or Hatred for ſome conſiderable Time before the Act; for the Stroke given, or an Attempt made by Malice implied, is as dangerous as a Stroke given upon Malice expreſſed, therefore may be as lawfully reſiſted. This very Point was alſo conſidered by the 12 Judges at *Serjeants's-Inn*, and by them reſolved to be Murder upon the Occaſion of my Lord *Morley*'s Caſe. When a Man attacks another with a dangerous Weapon, without any Provocation; that is expreſs Malice from the Nature of the Act, which is cruel. The Definition of Malice implied, is where it is not expreſs in the Nature of the Act, as where a Man kills an Officer that had Authority to arreſt his Perſon: The Perſon who kills him in Defence of himſelf from the Arreſt, is guilty of Murder, becauſe the Malice is implied, for properly and naturally it was not Malice, for his Deſign was only to defend himſelf from the Arreſt.

3. I

3. I come now to the third Matter propoſed, which is to conſider what is in Law ſuch a Provocation to a Man to commit an Act of Violence upon another, whereby he ſhall deprive him of his Life, ſo as to extenuate the Fact, and make it to be a Manſlaughter only. Firſt, negatively what is not. Secondly, poſitively what is. Firſt, no Words of Reproach or Infamy are ſufficient to provoke another to ſuch a Degree of Anger as to ſtrike, or aſſault the provoking Party with a Sword, or to throw a Bottle at him, or ſtrike him with any other Weapon that may kill him; but if the Perſon provoking be thereby killed, it is Murder.

In the aſſembly of the Judges, 18 *Car.* 2. this was a Point poſitively reſolved.

Therefore I am of Opinion, that if two are in Company together, and one ſhall give the other contumelious Language (as ſuppoſe *A* and *B*) *A*, that was ſo provoked, draws his Sword and makes a Paſs at *B*, *B* (then having no Weapon drawn) but miſſes him. Thereupon *B* draws his Sword and paſſes at *A*, and there being an Interchange of Paſſes between them, *A* kills *B*. I hold this to be Murder in *A*, for *A*'s Paſs at *B* was malicious, and what *B* afterwards did was lawful. But if *A*, who had been ſo provoked, draws his Sword, and then before he paſſes, *B*'s Sword is drawn, or *A* bid him draw, and *B* thereupon drawing, there happen to be mutual Paſſes: If *A* kills *B*, this will be but Manſlaughter, becauſe it was ſudden; and *A*'s Deſign was not ſo abſolutely to deſtroy *B*, but to combat with him, whereby he run the Hazard of his own Life at the ſame Time. But if Time was appointed to fight (ſuppoſe the next Day) and accordingly they do fight; it is Murder in him that kills the other. But if they go immediately into the Field and fight, then but Manſlaughter. Suppoſe upon provoking

voking Language given by *B* to *A*, *A* gives *B* a Box on the Ear, or a little Blow with a Stick, which happens to be so unlucky that it kills *B*, who might have some Imposture in his Head, or other Ailment which proves the Cause of *B*'s Death, this Blow, though not justifiable by Law, but is a Wrong, yet it may be but Manslaughter, because it doth not appear that he designed such a Mischief.

2. Secondly, as no Words are a Provocation, so no affronting Gestures are sufficient, though never so reproachful; which Point was adjudged in an Appeal of Murder.

There having been a Quarrel between *A* and *B*, and *B* was hurt in the Fray; and about two Days after, *B* came and made a wry Mouth at *A*, who thereupon struck him upon the Calf of the Leg, of which he instantly died. It was Murder in *A* for the affronting him in that Manner was not any Provocation to *B* to use that Violence to *A*.

There hath been another Case, which I fear hath been the Occasion of some Mistake in the Decisions of Questions of this Kind, *Jones* 432. *D. Williams*'s Case, he being a *Welshman*, upon St. *David*'s Day, having a Leak in his Hat, a certain Person pointed to a *Jack of Lent* that hung up hard by, and said to him look upon your Countryman; at which, *D. Williams* was much enraged, and took a Hammer that lay upon a Stall hard by, and flung at him, which missed him, but hit another and killed him: He was indicted upon the Statute of stabbing. Resolved, he was not within that Statute, but guilty of Manslaughter at Common-Law. I concur with that Judgment, that it is not within the Statute of Stabbing, for it is not such a Weapon, or Act that is within that Statute, neither could be found guilty of Murder, but only of Manslaughter, for the Indictment was for no more. But if

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the Indictment had been for Murder, I do think that the *Welſhman* ought to have been convicted thereof, for the Provocation did not amount to that Degree as to excite him deſignedly to deſtroy the Perſon that gave it him.

3. Thirdly, if one Man be treſpaſſing upon another, breaking his Hedges or the like, and the Owner, or his Servant ſhall, upon Sight thereof, take up an Hedge-ſtake, and knock him on the Head; that will be Murder, becauſe it was a violent Act, beyond the Proportion of the Provocation, which is ſufficiently juſtified by *Holloway*'s Caſe, who did not ſeem to intend ſo much the Deſtruction of the young Man that ſtole the Wood, as that he ſhould endeavour to break his Skull, or knock out his Brains, yet uſing that violent and dangerous Action of tying him to the Horſe's Tail, rendered him guilty of Murder.

If a Man ſhall ſee another ſtealing his Wood, he cannot juſtify beating him, unleſs it be to hinder him from ſtealing any more (that is) that notwithſtanding he be forbid to take any, he doth proceed to take more, and will not part with that which he had taken. But if he deſiſts, and the Owner or *Woodward* purſues him to beat him ſo as to kill him, it is Murder.

If a Man goes violently to take another Man's Goods, he may beat him off to reſcue his Goods, but if a Man hath done a Treſpaſs, and is not continuing in it; and he that hath received the Injury ſhall thereupon beat him to a Degree of killing. It is Murder, for it is apparent Malice; for in that Caſe he ought not to ſtrike him, but is a Treſpaſſor for ſo doing.

4. Fourthly, if a Parent, or a Maſter be provoked to a Degree of Paſſion by ſome Miſcarriage of the Child or Servant, and the Parent or Maſter ſhall proceed to correct the Child or Servant with a moderate Weapon, and ſhall by Chance give him an unlucky Stroke, ſo

ſo as to kill him, that is but a Miſadventure, but if the Parent or Maſter ſhall uſe an improper Inſtrument in the Correction, then if he kills the Child or Servant, it is Murder: And ſo was it reſolved by all the Judges of the *King's-Bench*, with the Concurrence of the Lord Chief Juſtice *Bridgman*, in a ſpecial Verdict in one *Gray's* Caſe, found at the *Old Baily*, 10 *Oct.* 18 *Car.* 2. and removed into this Court. *Gray* being a Smith, *B* was his Servant; he commanded *B*, his Servant, to mend certain Stamps belonging to his Trade; afterwards, he and his Servant being at Work at the Anvil, *Gray* aſked his Servant whether he had mended the Stamps, as he had deſired him, but *B*, the Servant, having neglected his Duty, acknowledged it to his Maſter, upon which the Maſter was angry, and told him if he would not ſerve him, he ſhould ſerve in *Bridewell*; to which the Servant replied, that he had as good ſerve in *Bridewell* as ſerve the ſaid *Gray*; whereupon the ſaid *Gray* took the Iron Bar, upon which he and his Servant was working, and ſtruck his Servant with it upon the Skull, of which the Servant died. This was held to be Murder, yet here was a Provocation on a Sudden, as a ſudden Reſentment, and as ſpeedy putting it in Execution; for though he might correct his Servant, both for his Neglect and Unmannerlineſs, yet exceeding Meaſure therein, it is malicious. Every one muſt perceive that this laſt is a much ſtronger Caſe than this at Bar.

1. Firſt, *Gray* was working honeſtly and fairly at his Trade, and juſtly calling to his Servant for an Account of his Buſineſs; this Miſcreant was in the actual Violation of all the Rules of Hoſpitality.

2. Secondly, *Gray's* Action was Right, as to the ſtriking his Servant by Way of Correction; but the Error was in the Degree, being too violent, and with an

an improper Weapon. This of *Maugridge* was with a Reſolution to do Miſchief.

3. Thirdly, he had not the leaſt Provocation from Mr. *Cope*, until after he had made the firſt and dangerous Aſſault, and then purſued it with the drawing his Sword to ſecond it, before Mr. *Cope* returned the other Bottle. But *Gray* had a Provocation by the Diſappointment his Servant gave him in neglecting his Buſineſs, and returning a ſaucy Anſwer.

The like in obſtinate and perverſe Children, they are a great Grief to Parents, and when found in ill Actions, are a great Provocation. But if upon ſuch Provocation the Parent ſhall exceed the Degree of Moderation, and thereby in chaſtiſing kill the Child, it will be Murder. As if a Cudgel, in the Correction that is uſed, be of a large Size, or if a Child be thrown down and ſtamped upon: So ſaid the Lord *Bridgeman* and Juſtice *Twiſden*, and that they ruled it ſo in their ſeveral Circuits.

5. If a Man upon a ſudden Diſappointment by another, ſhall reſort violently to that other Man's Houſe to expoſtulate with him, and with his Sword ſhall endeavour to force his Entrance, to compel that other to perform his Promiſe, or otherwiſe to comply with his Deſire; and the Owner ſhall ſet himſelf in Oppoſition to him, and he ſhall paſs at him, and kill the Owner of the Houſe, it is Murder, 2 *Roll.* Rep. 460. *Clement* againſt Sir *Charles Blunt*, in an Appeal of Murder. The Caſe was, that *Clement* had promiſed a Dog to Sir *Charles Blunt*, and being requeſted accordingly to deliver him, refuſed, and beat the Dog home to his Houſe; at which Sir *Charles Blunt* fetched his Sword, and came to *Clement*'s Houſe for the Dog, *Clement* ſtood at the Door, and reſiſted his Entry; *Blunt* thereupon kills *Clement*. The Jury were merciful, and found this Fact in Sir *Charles Blunt*, to be but Manſlaughter. *Dodde-*

ridge

ridge was clearly of Opinion it was Murder. But the Lord Chief Juſtice was a little tender in his Direction to the Jury. But *Rolls* makes this Remark, that it was not inſiſted upon by the Appellant's Council, that *Clements* was in the Defence of his Houſe, and that *Blunt* attacked *Clement* to force it. It was without all Queſtion Murder, though of a ſudden Heat, for there was no Aſſault made by *Clement* upon him, nor any of his Friends, but all the Violence and Force was on Sir *Charles Blunt*'s Side.

Having in theſe Particulars ſhewn what is not a Provocation ſufficient to alleviate the Act of Killing, ſo as to reduce it to be but a bare Homicide. I will now, ſecondly, give ſome particular Rules, ſuch as are ſupported by Authority and general Conſent, and ſhew what are always allowed to be ſufficient Provocations.

1. Firſt, if one Man upon angry Words ſhall make an Aſſault upon another, either by pulling him by the Noſe, or filliping him upon the Forehead, and he that is ſo aſſaulted ſhall draw his Sword, and immediately run the other through, that is but Manſlaughter; for the Peace is broken by the Perſon killed, and with an Indignity to him that received the Aſſault. Beſides, he that was ſo affronted, might reaſonably apprehend, that he that treated him in that Manner might have ſome further Deſign upon him.

There is a Caſe in *Stiles* 467. *Buckner*'s Caſe. *Buckner* was indebted, and *B* and *C* came to his Chamber upon the Account of his Creditor to demand the Money, *B* took a Sword that hung up, and was in the Scabbard, and ſtood at the Door with it in his Hand undrawn, to keep the Debtor in until they could ſend for a Bailiff to arreſt him; thereupon the Debtor took out a Dagger which he had in his Pocket, and ſtabbed *B*. This was a ſpecial Verdict, and adjudged only Manſlaughter,

ſlaughter, for the Debtor was inſulted, and impriſoned injuriouſly without any Proceſs of Law, and though within the Words of the Statute of Stabbing, yet not within the Reaſon of it.

2. Secondly, if a Man's Friend be aſſaulted by another, or engaged in a Quarrel that comes to Blows, and he in the Vindication of his Friend, ſhall, on a ſudden, take up a miſchievous Inſtrument and kill his Friend's Adverſary, that is but Manſlaughter. If two be fighting together, and a Friend of the one takes up a Bowl on a ſudden, and with it break the Skull of his Friend's Adverſary, of which he died, that is no more than Manſlaughter. So it is, if two be fighting a Duel, though upon Malice prepenſed, and one comes up and takes Part with him, that he thinks may have the Diſadvantage in the Combat, or it may be that he is moſt affected to, not knowing of the Malice, that is but Manſlaughter.

3. Thirdly, if a Man perceives another by Force to be injuriouſly treated, preſſed, and reſtrained of his Liberty, though the Perſon abuſed doth not complain, or call for Aid or Aſſiſtance; and others out of Compaſſion ſhall come to his Reſcue, and kill any of thoſe that ſhall ſo reſtrain him, that is Manſlaughter, 18 *Car.* 2. adjudged in this Court, upon a ſpecial Verdict found at the *Old Baily*, in the Caſe of one *Hugett*, 18 *Car.* 2. *A*, and others in the Time of the *Dutch* War, without any Warrant, impreſſed *B* to ſerve the King at Sea. *B* quietly ſubmitted, and went off with the Preſs-maſters: *Hugett* and the others purſued them, and required a Sight of their Warrant; but they ſhewed a Piece of Paper that was not a ſufficient Warrant: Thereupon *Hugett* with the others drew their Swords, and the Preſs-maſters theirs, and ſo there was a Combat, and thoſe who endeavoured to reſcue the Preſtman, killed one of the pretended Preſs-maſters. This

was but Manſlaughter, for when the Liberty of one Subject is invaded, it affects all the reſt: It is a Provocation to all People, as being of ill Example and pernicious Conſequence. All the Judges of the *King's-Bench*, viz. *Keilyng*, *Twiſden*, *Wyndham*, and *Moreton*, were of Opinion, that it was Murder, becauſe he meddled in a Matter in which he was not concerned: But the other eight Judges of the other Courts conceived it only Manſlaughter, to which the Judges of the *King's-Bench* did conform and gave Judgment accordingly.

4. Fourthly, when a Man is taken in Adultery with another Man's Wife, if the Huſband ſhall ſtab the Adulterer, or knock out his Brains, this is bare Manſlaughter; for Jealouſy is the Rage of a Man, and Adultery is the higheſt Invaſion of Property.

If a Thief comes to rob another, it is lawful to kill him. And if a Man comes to rob a Man's Poſterity and his Family, yet to kill him is Manſlaughter, ſo is the Law, though it may ſeem hard, that the Killing in one Caſe ſhould not be as juſtifiable as the other. 20 *Leviticus*, 10 Ver. *If one committed Adultery with his Neighbour's Wife, even he, the Adulterer, and the Adultreſs, ſhall be put to Death*, ſo that a Man cannot receive an higher Provocation. But this Caſe bears no Proportion with thoſe Caſes that have been adjudged to be only Manſlaughter, and therefore the Court being ſo adviſed, doth determine that *Mawgridge* is guilty of Murder. More might be ſaid upon this Occaſion; yet this may at preſent ſuffice to ſet the Matter now in Queſtion in its true Light, to ſhew how neceſſary it is to apply the Law to exterminate ſuch noxious Creatures. Upon this Conviction, the Court did direct that Proceſs ſhould be iſſued againſt *Mawgridge*, and ſo to proceed to Outlawry if he cannot be retaken in the mean Time.

In

In the Year 1708, Lord Chief Juſtice *Holt* [a] publiſhed the following Report, with ſome Notes of his own upon them.

"*A Report of divers Caſes in Pleas of the Crown, adjudged and determined, in the Reign of the late King* Charles *the* ſecond, *with Directions for Juſtices of the Peace, and others, collected by Sir* John Keyling, *Knt. late Lord Chief Juſtice of his Majeſty's Court of* King's-Bench, *from the original Manuſcript under his own Hand. To which is added, the Report of three modern Caſes, viz.* Armſtrong *and* Liſle; *The* King *and* [b] Plummer; *The* Queen *and* [c] Mawgridge."

Note; *Thurſday*, [d] 9 *February*, 1709, was the laſt Time his Lordſhip ſat in Court.

He married [e] *Anne*, Daughter of Sir *John* [f] *Cropley*, of *Clerkenwell*, in the County of *Middleſex*, Baronet; whom he left without Iſſue, and [g] departed this Life on the *fifth* Day of *March*, 1709, about 3 o'Clock in the Afternoon, at his Houſe in *Bedford-Row*, after a long lingering Illneſs, in the *ſixty-eighth* Year of his Age; and was ſucceeded by Sir *Thomas* [h] *Parker*, Knight, her Majeſty's youngeſt Serjeant at Law, who was ſworn into the Office the 13th of the ſaid Month of *March*, at the Lord Chancellor *Cowper*'s.

[a] *Foſt.* Cr. Law, P. 204. *Boy.* Remarkables of the Year 1710. P. 410.

[b] See it at large, in P. 47.

[c] See it at large, in P. 95.

[d] Mod. Rep. 11 Vol. P. 263.

[e] She died, *Jan.* 25, 1712, and was buried at *Redgrave* in *Suffolk*. *Le Neve's Monumenta Anglicana*. P. 253.

[f] He died in *December* 1713, Id. P. 272.

[g] Lord *Raym.* Rep. 2 Vol. P. 1309. Mod. Rep. 11 Vol. P. 276. *Tind.* Contin. *Rap.* Hiſt. *Engl.* 4 Vol. P. 156.

[h] Lord *Raym.* &c. Mod. Rep. as above. *Collins's* Peerage of *England*, 3 Vol. P. 493. *Gazette*. N°. 4665. Biſhop *Burnet* ſays, that immediately upon Lord Chief Juſtice *Holt's* Death, *Parker* was

Lord Chief Juſtice *Holt*'s Remains lie interred in the Pariſh Church of *Redgrave* in the County of *Suffolk*, under a moſt ſumptuous marble Monument, upon which there is a Figure of his Lordſhip in full Proportion, in his Robes of Chief Juſtice, ſetting in a Chair, and under him the following Inſcription:

[1] M. S.
D JOHANNES HOLT, Equitis Aur.
Totius Angliæ, in Banco Regio,
Per XXI Annos continuos,
CAPITALIS JUSTITIARII,
Gulielmo Regi, Annæq; Reginæ,
Conſiliarii perpetui,
Libertatis, ac Legum Anglicarum
ASSERTORIS, Vindicis, Cuſtodis,
Vigilis, acris, et intrepidi,
Rolandus Frater unicus, et Hæres,
Optime de ſe merito,
Poſuit.

Die Martii v^to. MDCCIX, ſublatus eſt ex Oculis noſtris.
Natus XXX Decembris, Anno MDCXLII.

But ſoon after a much more durable Monument than this was erected to his Memory; for his Lordſhip's Integrity and Uprightneſs as a Judge were celebrated by one of the beſt Writers of the Age (an Age characterized

was made Lord Chief Juſtice. This great Promotion (ſays *Burnet*) ſeemed an evident Demonſtration of Queen *Anne*'s approving the Proſecution againſt Doctor *Sacheverel*; for none of the Managers had treated him ſo ſeverely as *Parker* had done; yet ſecret Whiſpers were very confidently ſet about, that though the Queen's Affairs put her on acting the Part of one that was pleaſed with this Scene, yet ſhe diſliked it all, and would take the firſt Occaſion to ſhew it. *Burnet*'s Hiſt. of his own Times, 2 Vol. P. 543.

[1] *Le Neve's Monument. Anglican.* P. 168.

terized for inimitable ones) the Monument alluded to, is N°. 14 of the *Tatler*; it has been obſerved, and very juſtly too, that moſt of the Papers publiſhed in the *Tatlers*, *Spectators*, and *Guardians*, are written on Subjects which never vary, but are and will be for ever the ſame in all Ages, and in all Countries; that the Reader therefore may judge, whether the *Tatler* referred to is not one of that Sort, it is here inſerted at large, and is as follows:

" It would become all Men, as well as me, to lay before them the noble Character of *Verus* the Magiſtrate, who always ſat in Triumph over, and in Contempt of Vice: He never ſearched after it, or ſpared it when it came before him: At the ſame Time, he could ſee through the Hypocriſy and Diſguiſe of thoſe, who have no Pretence to Virtue themſelves, but by their Severity to the vicious. The ſame *Verus* was, in Times long paſt, Chief Juſtice (as we call it amongſt us) in *Felicia*. He was a Man of profound Knowledge of the Laws of his Country, and as juſt an Obſerver of them in his own Perſon. He conſidered Juſtice as a cardinal Virtue, not as a Trade for Maintenance. Wherever he was Judge, he never forgot that he was alſo Council. The Criminal before him was always ſure he ſtood before his Country, and, in a Sort, a Parent of it. The Priſoner knew, that though his Spirit was broken with Guilt, and incapable of Language to defend itſelf, all would be gathered from him which could conduce to his Safety; and that his Judge would wreſt no Law to deſtroy him, nor conceal any that could ſave him. *In his Time there was a Neſt of Pretenders to Juſtice, who happened to be employed, to put Things in a Method for being examined before him at his uſual Seſſions: Theſe Animals were to* Verus, *as Monkies are to Men, ſo like, that you can hardly diſown them; but ſo baſe, that*

you are ashamed of their Fraternity. It grew a Phrase, 'who would do Justice on the Justices?' That certainly would *Verus.* I have seen an old Trial where he sat Judge on two of them; one was called *Trick-Track*, the other *Tearshift*: One was a learned Judge of Sharpers, the other the Quickest of all Men at finding out a Wench. *Trick-Track* never spared a Pick-pocket, but was a Companion to Cheats: *Tearshift* would make Compliments to Wenches of Quality, but certainly commit poor ones. If a poor Rogue wanted a Lodging, *Trick-Track* sent him to Gaol for a Thief: If a poor Whore went only with one thin Petticoat, *Tearshift* would imprison her for being loose in her Dress. These Patriots infested the Days of *Verus*, while they alternately committed and released each others Prisoners. But *Verus* regarded them as Criminals, and always looked upon Men as they stood in the Eye of Justice, without respecting whether they sat on the Bench, or stood at the Bar."

His Lordship died, seized of a very considerable real Estate, Part of which he purchased of the Barons of *Redgrave* in *Suffolk*, premier Baronets of *England*; in what Manner his Lordship was pleased to dispose of it, and also of a very large personal Estate may be seen in the following Abstract of his Lordship's Will and Codicils.

ABSTRACT

ABSTRACT of Lord Chief Juſtice *HOLT*'s WILL and CODICILS, &c.

SIR *JOHN HOLT*, Knight, Lord Chief Juſtice of the Court of *Queen's-Bench* at *Weſtminſter*, to her late Majeſty Queen *Anne*, by his laſt Will and Teſtament, bearing Date the 4th Day of *September*, 1708, revoked all former Wills, and after reciting, that he had by Deed, out of his Manor of *Redgrave*, and other his Manors and Hereditaments in the County of *Suffolk*, made one Demiſe to Truſtees, to ſecure for his Wife the yearly Sum of 700*l.* for ſo long Time as ſhe ſhould live; he did, by his ſaid Will, ratify and confirm the ſaid Deed in as large a Manner as was therein expreſſed, and (ſubject unto the ſaid Charge) he deviſed all his Manors, Meſſuages, Lands, Tenements, and Hereditaments in the ſaid County of *Suffolk*, and likewiſe in *Bray*, in the County of *Berks*, and of *Royſton*, and elſewhere, in the Counties of *Hertford* and *Cambridge*, and each of them, and in *Tilby*, or elſewhere, in the County of *Norfolk*, and in the City of *Oxford*, in the County of *Oxon*; and all other his Lands and Inheritance whatſoever and whereſoever, to his Brother *Rowland Holt*, for, and during his Life, without Impeachment of Waſte, and from and after the Determination of that Eſtate, to *William Longueville*, of the *Inner Temple*, *London*, Eſq; and *Silveſter Petyt*, of *Barnard's-Inn*, *London*, Gentleman, and their Heirs, during the Life of his ſaid Brother in Truſt, to preſerve the contingent Remainders therein, after deviſed, from being barred, but to permit his ſaid Bro-

ther to take the Rents and Profits thereof, to his own Uſe for his Life, and from and after the Deceaſe of his ſaid Brother, to *John Holt* (his eldeſt Son) for his Life, without Impeachment of Waſte, and from and after the Determination of that Eſtate, to the ſaid *William Longueville* and *Silveſter Petyt*, and their Heirs, during the Life of the ſaid *John Holt*, in Truſt, to preſerve the contingent Remainders therein, after deviſed, from being barred, but to permit the ſaid *John Holt*, to take the Rents and Profits thereof to his own Uſe for his Life, and from and after the Deceaſe of the ſaid *John Holt*, to the firſt and every other Son and Sons of the Body of the ſaid *John Holt*, to be begotten ſucceſſively, and the Heirs male of the Body and Bodies of ſuch firſt and other Son and Sons to be begotten ſeverally and reſpectively; the eldeſt of ſuch Sons, and the Heirs male of his Body, to be begotten, being always to be preferred before the younger of ſuch Sons, and the Heirs male of his and their Body and Bodies iſſuing. And in Default of ſuch Iſſue, the Teſtator deviſed all his ſaid Eſtates in like Manner to *Thomas Holt* (ſecond Son of his ſaid Brother) and in Default of ſuch Iſſue, the ſaid Teſtator further deviſed all his ſaid Eſtates in like Manner to *Rowland Holt* (third Son of his ſaid Brother) and in Default of ſuch Iſſue, to *Henry Holt* (fourth Son of his ſaid Brother) and in Default of ſuch Iſſue, to all and every other the Sons of his Brother the ſaid *Rowland Holt*, and the Heirs male of their ſeveral and reſpective Bodies, lawfully iſſuing the elder of ſuch Sons, and the Heirs male of his Body, being to be preferred before the younger of ſuch Sons, and the Heirs male of their Bodies reſpectively. And in Default of ſuch Iſſue, the ſaid Teſtator further deviſed all his ſaid Eſtates in like Manner to *Edward Leman* (Son of his Siſter *Leman*) and in Default of ſuch Iſſue, to *John Levett* (eldeſt Son of his Siſter *Levett*) and for Default of ſuch Iſſue, to

Richard

Richard Levett (ſecond Son of his Siſter *Levett*) and in Default of ſuch Iſſue, to his own right Heirs for ever. And if all his Brother's Iſſue male ſhould fail, ſo as the ſaid *Suffolk* Eſtate, or the capital Meſſuage of *Redgrave*, and the Manor of *Redgrave* (Part of the ſaid *Suffolk* Eſtate) ſhould come to and be veſted in the ſaid *Edward Leman*, or any his Iſſue male, or in the ſaid *John Levett*, or any his Iſſue male, then he willed, that when, and as he and they ſhould come to and be in Poſſeſſion of the ſaid *Suffolk* Eſtate, or the ſaid capital Meſſuage of *Redgrave*, and Manor of *Redgrave*, by Virtue of his Will, ſuch of them, who from Time to Time, ſhould ſo be in Poſſeſſion, ſhould uſe the Name of *Holt* only, for his and their Sirname: The Teſtator further willed, that his Brother, and each, and every other of the Perſons therein before made Tenants for their reſpective Lives, and who ſhould, by Virtue of his ſaid Will, thereafter be made Tenants for their reſpective Lives, of any other Hereditaments, when, and as in Poſſeſſion of any of the Manors, Meſſuages, Lands, and Hereditaments, of which they were to be but Tenants for their Lives reſpectively, by Virtue of his ſaid Will, ſhould, and might, by any Writing indented and executed before two or more Witneſſes, from Time to Time, Leaſe all, or any Parts of the ſaid Hereditaments, for any Term or Terms of Years, not exceeding one and twenty Years, provided that no ſuch Leaſe was made diſpuniſhable of Waſte, nor made to commence in Remainder or Reverſion, and ſo as there was reſerved yearly, during the Continuance of every ſuch Leaſe, the beſt improved Rent, which at the Time of making thereof, could, or might be gotten for the ſame, without taking any Fines for making thereof. And the Teſtator willed, that every of his Brother's Sons, and the ſaid *Edward Leman*, *John Levett*, and *Richard Levett*, when, and as they ſhould

ſhould be in Poſſeſſion of any of the Premiſſes limited to them for their Lives reſpectively as aforeſaid, and when, and as they ſhould be in Poſſeſſion of any other the Premiſſes as thereafter might be limited to them reſpectively for their Lives, by Virtue of his ſaid Will might, and ſhould have Power and Authority for, and in Reſpect of every one thouſand Pounds, which every Woman whom he and they reſpectively ſhould marry, ſhould bring or ſhould have brought as a Marriage Portion, to ſettle as, and for a Jointure, upon every ſuch Woman, Lands, Tenements, and Hereditaments, of the Value of one hundred Pounds *per Annum*, for, and during the Term of every ſuch Woman's Life, to commence from, and after the Deceaſe of them who ſhould ſo ſettle any ſuch Jointure, and ſo for more and for leſs. The Teſtator deviſed to the ſaid *William Longueville* and *Silveſter Petyt*, (whom he made Executors of his Will,) their Heirs, Executors, and Adminiſtrators, all ſuch real and perſonal Eſtates as were or ſhould be in Mortgage to him, or to any Perſon or Perſons in Truſt for him; and all Moneys which ſhould be due and owing to him at his Deceaſe, upon Securities by Bond, Mortgage, Judgment, or otherwiſe. The Teſtator directed his funeral Charges, Debts, and Legacies, to be paid, and to be buried at *Redgrave*; his Funeral to be ordered as his Wife ſhould direct, as privately as could be with Decency. And to his Wife he deviſed two hundred Pounds of lawful Money of *Great Britain*, to be paid her out of the Arrears of Rents and Intereſt that ſhould be due to him when he died, and ſo ſoon as might be after his Deceaſe; and he deviſed to her alſo, the Sum of 2100*l.* of like Money, ſecured by the Mortgage of Mr. *S.* made to him and her; and the Sum of 600*l.* of like Money, ſecured to him and her by Sir *P. B.* on Mortgage, and 300*l.* more of like Money, which he

he had put out as his own Money, and for which ſhe had his Note. And he gave to her all her wearing Apparel, and Linen, and all the Jewels, Necklaces, Watches, Rings, Plate, Pictures, and Linen, and likewiſe the Houſhold-Goods, which he ſhould have at the Time of his Death in the Houſe where he lived in *Bedford-Row*, or in any other Houſe which he ſhould dwell in, except what ſhould be in and about his Houſe at *Redgrave*; and alſo ſuch Coach and Horſes as ſhe ſhould have uſed during his Life. He directed his Brother ſhould be paid by his Executors and Truſtees, ſo much *per Annum*, out of his perſonal Eſtate, as during his Wife's Life ſhould, and might make up the Reſidue of the Rents and Profits of his Eſtates in *Suffolk*, and elſewhere, deviſed to him for his Life, the yearly Sum of 1000*l.* of like Money, over and above all Parliament and other Taxes and Charges whatſoever. The Teſtator further deviſed to his Siſter *Leman*, 200*l.* a Year of like Money for her Life, to be paid her by half-yearly Payments, from the Time of his Deceaſe, that is to ſay, at the Feaſt of St. *Michael* the Archangel, and of the Annunciation of the Bleſſed Virgin, the firſt Payment to be made at ſuch of the ſaid Feaſts as ſhould firſt and next happen after his Deceaſe. To his Siſter *Levett*, he deviſed the Sum of 200*l.* of like Money, to be paid her within one Year after his Deceaſe. To his Executors he gave 50*l.* of like Money apiece. To the Poor of the Pariſh where he ſhould be buried, he gave 50*l.* of like Money. To Mr. *John Ince*, and to *Robert Hyde*, *Joſeph Maſon*, and *Edward Ventris*, he gave twenty Pounds of like Money apiece for Mourning; and his Will was, that the Rents and Profits of all his Manors, Lands, and Tenements, and all ſuch Intereſt-Money as ſhould be due when he died, (his Debts, Legacies, and funeral Expences being firſt paid) and all Intereſt-Money that

ſhould

ſhould accrue after his Death (over and above the 1000*l. per Annum*, to be made up as aforeſaid to his Brother) ſhould be, by his ſaid Truſtees, diſpoſed of, at Intereſt, until, from thence, the Sum of 7000*l.* ſhould be raiſed for his Brother's Daughters, and younger Sons, in Manner as was therein after expreſſed (that is to ſay) the ſaid 7000*l.* ſhould be divided amongſt his ſaid Brother's Daughters, and younger Sons, in equal Proportions, and be paid, and payable to the Daughters, at their reſpective Days of Marriage, or Ages of 21 Years, which ſhould firſt happen. And to the younger Sons, when they ſhould reſpectively attain their Ages of 21 Years, or ſooner if his Executors and Truſtees, or the Survivor of them ſhould think fit, for the Good of any of the younger Sons, to have his or their Portion or Portions, or Part of the ſame to be paid ſooner; as for placing any of them out Apprentices, or otherwiſe. And the Intereſt or Proceed of the ſaid 7000*l.* after ſuch Time, as the ſaid Sum of 7000*l.* ſhould be raiſed, the Teſtator directed to be paid, to for and among the ſaid Daughters and younger Sons of his Brother, for their Maintenance, in equal Proportions, until their Portions reſpectively, ſhould become due and payable as aforeſaid, and if any of his ſaid Brother's Daughters, or younger Sons, ſhould die before their Portions became payable, then he directed the Portion and Portions of her, him, or them, ſo dying, to go and be together with Intereſt thenceforth to be due for the ſame, to the Survivors of the ſaid Daughters and younger Sons equally. He deſired that his Executors and Truſtees ſhould be allowed all their Expences and Charges occaſioned by their being his Truſtees and Executors. He impowered them to make ſuch Agents under them, from Time to Time, as they ſhould ſee needful, with reaſonable Allowances. And he willed, that they ſhould

not

not be anſwerable one for another, and by no Means for involuntary Loſſes, or the Miſcarriages of any Perſon or Perſons whom they, or either of them, ſhould uſe or truſt in the receiving, returning, keeping, or Payment of any the Monies which ſhould belong unto thoſe Truſts which he had repoſed in them. The Uſe of the Houſhold Goods and Furniture which he ſhould have in or about his Houſe at *Redgrave*, he directed ſhould, from Time to Time go with the ſaid Houſe, from his Brother to his Son, and Sons who was and were to ſucceed in the Enjoyment of the ſaid Houſe; and, likewiſe, to the ſaid *Edward Leman*, *John Levett*, and *Richard Levett*, as they, or any of them ſhould ſucceed in the Enjoyment of the ſaid Houſe. All his Books, whether manuſcript or printed, he bequeathed to his Nephew *John Holt*, and deſired the ſame might be preſerved in his Family. And he alſo deſired, that all the Reſt and Reſidue of his Monies and perſonal Eſtate (which ſhould be on Securities when he died) ſhould be continued at Intereſt, until Purchaſes were made, and as his Executors and Truſtees aforenamed, or the Survivor of them ſhould, from Time to Time, think good, and that the ſame ſhould be laid out and diſpoſed in the Purchaſe of Lands and Tenements of Inheritance by his ſaid Executors, or the Survivor of them, as ſoon as convenient. And he directed that the ſame ſhould be ſettled on the ſame Perſons, and to and for the ſame Uſes, Eſtates, and Purpoſes, and with the ſame Powers and Authorities as his Manor of *Redgrave*, and capital Meſſuage of *Redgrave*, and other Lands and Hereditaments were therein before limited.

The ſaid Teſtator, by a Codicil to his Will, bearing even Date therewith, did further deviſe unto his Brother, the abovenamed *Rowland Holt*, all the Profits of the Chief Clerk, for inrolling of Pleas in the Court of

Queen's-

Queen's-Bench; the Dutcheſs of *Grafton* being firſt paid, and after her Death, the whole Profits to the ſaid *Rowland Holt*'s own Uſe, he allowing to *Robert Coleman*, Gent. ſuch annual Sum as ſhould be reaſonable for his Care and Pains.

By a ſecond Codicil to his ſaid Will, dated 20th of *December*, 1709, after reciting, that he had by an Indorſement upon his ſaid Will, deviſed unto his Brother, *Rowland Holt*, all the Profits of the Chief Clerk, of inrolling of Pleas in the Court of *Queen's-Bench*, the ſaid *Rowland Holt*, allowing to *Robert Coleman*, Gent. ſuch annual Sum as might be reaſonable for his Care and Pains; and alſo reciting, that the ſaid *Robert Coleman* was joint Clerk with his ſaid Brother for inrolling of Pleas, and the ſaid *Robert Coleman* had ſurrendered his Intereſt therein, and *Edward Ventris*, Eſq; was admitted into the Place of the ſaid *Robert Coleman*; the ſaid Sir *John Holt*, did revoke, diſannul, and make void the Allowance to be by his ſaid Brother made to the ſaid *Robert Coleman*; and he did thereby order, that his ſaid Brother ſhould allow unto the ſaid *Edward Ventris*, ſuch annual Sum of Money as might be reaſonable for his Care and Pains, in and about the Execution of the ſaid Office of Chief Clerk.

The abovenamed Sir *John Holt*, by a third Codicil to his ſaid Will, dated 23d of *February*, 1709, did further deviſe unto his ſaid Brother, the abovenamed *Rowland Holt*, his Executors and Aſſigns, all the Profits of the Chief Clerk, of inrolling of Pleas in the abovementioned Court of *Queen's-Bench* (he and they paying and allowing as abovementioned) for and during the Lives of his ſaid Brother, and of the abovenamed *Edward Ventris*, and of the Survivor of them; and he did thereby republiſh his Will.

The ſaid Sir *John Holt*, did, by a fourth Codicil, dated 24th of *February*, 1709, appoint, that out of his

his perſonal Eſtate, ſhould be paid for ſuch Mourning as his Wife ſhould think fit to give to any of his Relations, not exceeding Nephews and Neices. He did thereby, give to the Pariſh of St. *Andrew Holborn*, wherein he dwelt, twenty Pounds, to be paid to the Church-Wardens of the ſame Pariſh, for the Benefit of the Poor therein. And he willed, that his Wife ſhould beſpeak and diſpoſe of ſo many Mourning Rings to ſuch Perſons, and of ſuch Value ſuch Rings ſhould be, as ſhe ſhould think fitting, which, with the ſaid 20*l.* ſhould alſo be paid by, and out of his perſonal Eſtate. And he did thereby, give unto [k] *Knightly Danvers*, Eſq; to be paid out of his perſonal Eſtate, twenty Guineas, as a Token of his Reſpect to him, *which he would ſooner have done, had he had an Opportunity*. He willed, that the Agreements, if any, made by *R. B.* Eſq; or which ſhould be made by him, with any of his Tenants in *Suffolk*, ſhould ſtand and be performed; and that the ſaid Writing ſhould be taken as Part of, and a Codicil to his Will.

The ſaid Sir *John Holt*, by a fifth Codicil, dated 1ſt of *March*, 1709, to be added to his Will, and which he deſired might be taken for, and as Part of it; to all ſuch Servants as attended him in his Sickneſs he gave Legacies, which he directed to be paid ſoon after his Deceaſe; and to each of them he gave five Pounds apiece for Mourning. His Will was, that for one calendar Month, next after his Deceaſe, his domeſtic Servants might be maintained at the Executor's Charge. To *T. P.* he gave five Pounds, and five Pounds for Mourning. To *R. B.* Eſq; he deviſed ten Pounds for Mourning. To Mr. *J. H.* he gave ten Pounds. To his Executors he left Mourning.

N. B.

[k] He was the Author of the Abridgment, which he dedicated to the Chief Juſtice.

N. B. *His Lady, and one of his Truſtees and Executors, were the only two Witneſſes to this Codicil.*

Octavo Die Menſis Julii Anno Dni milleſimo ſeptingenteſimo decimo emanavit Commiſſio Roberto Raymond, *Arm. Solicitatori Generali Dnæ noſtræ Reginæ et* Edwardo Ventris, *Arm. ad adminiſtrandum Bona, Jura, Credita, præbonorandi Viri Dni* Johannis Holt, *Militis Capitalis Juſticiarii Dominæ noſtræ Reginæ ad Placita coràm ipſâ Reginâ tenenda aſſignati Defti habentis, &c. juxta Tenorem et Effectum Teſtamenti et quinque Codicillorum ejuſdem Defuncti eo quod* Guillielmus Longueville, *Arm. et* Silveſter Petyt, *Generoſus, Executores in dicto Teſtamento dicti Defuncti nominat. Oneri Executionis eorundm Teſtamenti et Codicillorum expreſſe renunciaverint de bene et fideliter adminiſtrando eadem ad ſancta Dei Evangelia jurata Dna* Anna Holt, *Vidua Relicta dicti Defuncti et Legataria in dicto Teſtamento nominata noſtris Admnis. cum dicto Teſtamento annexo prius renunciante prout ex Actis Curiæ liquet.*

On the *fifth* Day of *March*, 1745, Adminiſtration (with the Will and five Codicils annexed) of the Goods, Chattels, and Credits of the ſaid Sir *John Holt*, deceaſed, left unadminiſtred by *Robert Raymond*, Eſq; her late Majeſty Queen *Anne*'s Solicitor General (afterwards *Robert* Lord *Raymond*, late Lord Chief Juſtice of his Majeſty's Court of *King's-Bench*) and *Edward Ventris*, Eſq; now alſo reſpectively deceaſed, was granted to *Thomas Thurſton*, Eſq; the lawful Attorney of *Rowland Holt*, Eſq; the great Grand Nephew and Heir at Law of the ſaid Sir *John Holt*, deceaſed; and as ſuch the reſiduary Legatee ſubſtituted in the ſaid Will, for the Uſe and Benefit of the ſaid *Rowland Holt*, now at *Rome* (for that *William Longueville*, Eſq; and *Silveſter Petyt*, the Executors, named in the ſaid Will, *formerly* renounced the Execution of the ſaid Will and Codicils, and Dame *Ann Holt*, Widow, the Relict

Relict of the ſaid deceaſed and Legatee, named in the ſaid Will; alſo *formerly* renounced Letters of Adminiſtration (with the ſaid Will and Codicils annexed) of the Goods of the ſaid deceaſed; the ſaid *Thomas Thurſton* being firſt ſworn duly to adminiſter.

On the *ſecond* Day of *December*, 1762, Admiſtration, with the Will, *&c.* [as before] of the Goods, Chattels, and Credits of the Right Honourable Sir *John Holt*, Knight, late Lord Chief Juſtice of her late Majeſty Queen *Ann*'s Court of *Queen's-Bench*, deceaſed; left unadminiſtred by *Robert Raymond*, Eſq; (afterwards *Robert* Lord *Raymond*) and *Edward Ventris*, Eſq; now alſo reſpectively deceaſed, was granted to *Rowland Holt*, Eſq; the Grand Nephew, Deviſee in Tail, and as ſuch the reſiduary Legatee, ſubſtituted in the ſaid Will, having been firſt ſworn duly to adminiſter, (for that *William Longueville*, *&c.* [*verbatim* as before] and the Letters of Adminiſtration (with the ſaid Will and Codicils annexed) of the Goods unadminiſtred of the ſaid deceaſed, granted to *Thomas Thurſton*, Eſq; as the lawful Attorney of the ſaid *Rowland Holt*, then at *Rome*, being ceaſed and expired by Reaſon of the Death of the ſaid *Thomas Thurſton*.

The laſt mentioned *Rowland Holt*, one of the preſent Knights of the Shire for the County of *Suffolk*, enjoys the Chief Juſtice's Eſtate at this Day, being his Lordſhip's own Brother's third Son's eldeſt Son and Heir.

POINTS of LAW, resolved by *HOLT*, Chief Justice, upon Evidence in Trials at *Nisi Prius*.

N. B. The Cases are inserted in Order of Time.

Lent Assizes, 1693, 5 *Wil.* & *Mar.* at *Cambridge*.

THE Dispute [a] was between the Lord of the Manor and the Devisee of a Copyhold of the same Manor. And he ruled,

That the Recital of the Will, in the Copy of the Admittance, was good Evidence of the Devise against the Lord or any other Stranger. But if the Suit had been between the Heir of the Copyholder and the Devisee, the Will itself ought to have been produced.

2. That the foul Draught of the Steward of the Manor of the Admittance was good Evidence.

At the Sittings for *Middlesex*, *Mich.* 5 *Wil.* & *Mar.*

In Debt upon Bond, brought by *J. S.* Sheriff of the County of, *&c.* [b] The Defendant pleaded, that the said Bond was acknowledged by *J. N.* to the Plaintiff for the Office of Under-sheriff, and that he was Surety in the said Bond; and then he pleaded the Stat. of 5 & 6 *Edw.* 6. Cap. 16. against buying and selling Offices, *&c.* and upon the Trial, *A* was produced as a Witness, to give an Account, upon what Occasion this Bond was acknowledged, *&c.* and the Chief Justice refused to admit *A* to be a Witness, because it ap-

[a] Lord *Raym.* Rep. P. 735.
[b] Lord *Raym.* Rep. P. 733.

appeared, that he was privately intruſted by both Parties, to make the Bargain, and keep it Secret. And a Truſtee ſhall not be a Witneſs, in order to betray the Truſt.

Niſi Prius, Eaſter, 6 Wil. & Mar. 1694.

Where *A* [c] purchaſed the Intereſt of a Leaſe for Years, and the Writings were left in the Hands of *B* an Attorney, to draw an Aſſignment of; *B* drew it, and it was ſealed, but *B* refuſed to deliver it, until *A* paid for it; upon which *A* brought *Trover* againſt *B* for the Deed: It was ruled, that the Action well lay; becauſe *B* might have an Action for what he deſerved, but he could not detain for it.

At *Guildhall, Trin. 7 Wil. 3. 1695.*

In Caſe of [d] foreign Bills of Exchange, the Cuſtom is, that three Days are allowed for Payment of them; and if they are not paid upon the laſt of the ſaid Days, the Party ought immediately to proteſt the Bill, and return it, and by this Means the Drawer will be charged: But if he does not proteſt the laſt of the three Days, which are called the Days of Grace; there, although he upon whom the Bill is drawn fails, the Drawer will not be chargeable; for it ſhall be reckoned his Folly, that he did not proteſt, *&c.* but if it happens, that the laſt of the ſaid three Days is a *Sunday*, or a great Holiday, as *Chriſtmas* Day, *&c.* upon which no Money uſed to be paid, there the Party ought to demand the Money upon the ſecond Day; and if it is not paid, he ought to proteſt the Bill the ſaid ſecond Day; otherwiſe it will be at his own Peril, for the Drawer will not be chargeable. Merchants in Evi-

[c] Lord *Raym.* Rep. P. 738.
[d] Lord *Raym.* Rep. P. 743.

dence, ſwore the Cuſtom of Merchants to be ſuch, which was approved by the Chief Juſtice.

2. There is no Cuſtom for the Proteſt of inland Bills of Exchange, nor any certain Time aſſigned by the Cuſtom for the Payment of them; therefore the Money ought to be demanded in reaſonable Time, after it is payable; and then if it is not paid, the Drawer will be charged. See the Statute of 9 *Will.* 3. Cap. 17.

3. If the Indorſee of a Bill accepts but two Pence from the Acceptor, he can never after reſort to the Drawer.

4. The Notes of Goldſmiths (whether they be payable to Order or to Bearer) are always accounted among Merchants as ready Caſh, and not as Bills of Exchange.

5. The Time of receiving Money upon a Goldſmith's Note is immediately, or elſe it will be at the Peril of him who has the Note. He who delivers over the Note will not be charged, if the Goldſmith fail, as the Drawer of a Bill of Exchange would be; but the Receiver is ſuppoſed to give Credit to the Goldſmith, and the Note is looked upon as ready Money, payable immediately; and if he does not like it, he ought to refuſe it; but having accepted it, it is at his Peril. (But note, if the Party to whom the Note is delivered, demands the Money of the Goldſmith, in reaſonable Time, and he will not pay it, it will charge him who gave the Note. *Hopkins*[e] & *Geary*, *Hill.* 1 *Ann.* B. R, *Guildhall.*)

6. A Goldſmith's Note, indorſed, is as a Bill of Exchange againſt the Indorſor. *Taſſel* & *Lee* againſt *Lewis*.

At

[e] Lord *Raym.* Rep. P. 744. Mod. Rep. Vol. 7. P. 139.

At *Guildhall*, *Easter*, 8 *Wil.* 3. 1696.

A Creditor was [f] admitted to prove his Bond, and the Debt due upon it, upon *plene administravit* pleaded, he having before received it of the Administrator, and delivered up the Bond. *Kingston* against *Grey*.

At the Sitting at *Westminster*, *Hil.* 9 *Wil.* 3. 1697.

In an [g] Indictment for a Nusance, it was ruled, that the Building of an House in a larger Manner than it was before, whereby the Street became darker, is not any public Nusance, by Reason of the darkening. The King against *Webb*.

At *Lent* Assizes at *Winchester*, 1697, 9 *Wil.* 3.

If *A*, *B*, *C* and *E*, claim [h] Common in a Place called *Dale*, exclusively of all other Persons, and the Common of *A* comes in Dispute, *B* may be a Witness to prove that *A* has Right of Common there; because in Effect it charges himself, *viz.* he admits another to have Common with himself; but if the Prescription be, that all the Inhabitants of *Blackacre* ought to have Common there; one of the Inhabitants cannot be a Witness, to prove that another of the said Inhabitants ought to have Common there, because in Effect he would swear to give himself Right of Common there. *Hockley* against *Lamb*.

At same Time and Place.

Upon a Trial at *Nisi Prius*, it was ruled,

1. That if *A* [g] plants a Tree upon the extremest Limits of his Lands, and the Tree growing, extends its Root into the Land of *B* next adjoining, *A* and *B* are Tenants in Common of this Tree. But if all the Root

 grows

[f] Lord *Raym.* Rep. P. 745.
[g] Lord *Raym.* Rep. P. 737.
[h] Lord *Raym.* Rep. P. 734.

grows into the Land of *A*, though the Boughs overſhadow the Land of *B*, yet the Branches follow the Root, and the Property of the Whole is in *A*.

2. If there be two Tenants in Common of a Tree, and one cuts the whole Tree; though the other cannot have an Action for the Tree, yet he may have an Action for the ſpecial Damage by this cutting; as where one Tenant in Common deſtroys the whole Flight of Pigeons. *Waterman* againſt *Soper*.

At *Niſi Prius*, at *Guildhall*, *Tueſday*, *Jan.* 31, *Hil.* 10. *W.* 3. 1698.

It was ruled upon Evidence in Trial,

1. That if the Goods of *A* * be ſeized upon a *Fieri facias* iſſued upon a Judgment obtained againſt *A*, and after the Seizure, *A* become Bankrupt; this Act of Bankruptcy cannot affect the Goods levied in Execution as aforeſaid. But if *A* was a Bankrupt before the Seizure, and after the Bankruptcy, the Sheriff, upon a Writ of *Fieri facias* to him directed upon a Judgment obtained againſt *A*, ſeizes the Goods and ſells them, and a Commiſſion of Bankruptcy is granted, and the ſaid Goods aſſigned by the Commiſſioners, the Aſſignee of the Commiſſioners may maintain *Trover* againſt the Vendee of the Goods; but no Action will lie againſt the Sheriff, becauſe he obeyed the Writ.

2. If a Trader, hearing that a Writ of *Fieri facias* was iſſued againſt him, to the Intent to preſerve his Goods from being levied in Execution, clandeſtinely conveys them out of his Houſe, and conceals them privately; that does not amount to an Act of Bankruptcy.

3. That a Seizure of Part of the Goods in an Houſe, by Virtue of a *Fieri facias*, in the Name of the Whole, is a good Seizure of all.

4. It

* Lord *Raym.* Rep. P. 724, 725.

4. It was reſolved in this Caſe, that if Goods of *A* are ſeized upon a *Fieri facias*, and ſold to *B*, *bonâ Fide*, upon valuable Conſideration; though *B* permits *A* to have the Goods in his Poſſeſſion, upon Condition that *A* ſhall pay to *B* the Money, as he ſhall raiſe it by the Sale of the Goods, this will not make the Execution fraudulent. And in ſuch Caſe a ſubſequent Act of Bankruptcy by *A* will not defeat the Sale. But though the original Debt was juſt, yet if the Execution was fraudulent, *viz.* upon any Truſt, a ſubſequent Act of Bankruptcy will defeat it. *Cole* againſt *Davies*.

At *Weſtminſter*, 14 *February*, 1698, 10 *Wil.* 3.

A Conſtable [l] may execute the Warrant of a Juſtice of Peace, *&c.* out of his Liberty, but he is not compellable to execute it there. ——— againſt *Norman* and others.

At *Wincheſter*, *Lent* Aſſizes, 10 *Wil.* 3. 1698.

It was ruled, 1. That a Man [m] may preſcribe for Common, for Cattle, *levant* and *couchant* upon a Meſſuage. And the Chief Juſtice ſaid, that he knew *Hale*, Chief Juſtice, to have been of the ſame Opinion at *Norfolk* Aſſizes.

2. By him a Man cannot preſcribe for common appurtenant to a Farm; becauſe it is uncertain, of what a Farm conſiſts, perhaps, of ten Acres, or of an hundred Acres; but the Preſcription ought to be laid, to a Meſſuage and ſo many Acres of Land. But if there is an antient Farm, and the ſame Lands always occupied with it; a Man may have Common of Paſture, to depaſture his Cattle tilling that Farm. *Hockley* againſt *Lamb*.

[l] Lord *Raym.* Rep. P. 736.
[m] Lord *Raym.* Rep. P. 726.

At the ſame Aſſizes.

A makes his Will in theſe [a] Words, *viz.* "I Deviſe to *J. S.* all thoſe my Lands in *Bramſted*, in the County of *Surrey*, in the Poſſeſſion of *John Aſhley*;" whereas, in Fact, *A* had not any Lands in *Surrey*, but he had Lands in *Bramſted* in *Hampſhire*, in the Poſſeſſion of *John Aſhley*. And in an Ejectment brought by the Heir of *A*, for theſe Lands in *Hampſhire*, againſt the Deviſee; it was ruled, that theſe Lands in *Hampſhire* would paſs by this Deviſe, and the Plaintiff was Nonſuit. *Haſtead* againſt *Searle*.

At *Hertford*, *Lent* Aſſizes, 1698, 10 *Will.* 3.

In Treſpaſs [c] brought againſt the Sheriff for Goods taken, upon not guilty pleaded, he gave in Evidence, that he levied them in Execution, by Virtue of a *Fieri facias*. The Plaintiff made Title to the Goods by a prior Execution, but fraudulent, and by Bill of Sale made of them to him by the Officer, *viz.* the Sheriff, Predeceſſor to the Defendant. And upon this Trial, it was ruled, after Argument of the Council of both Sides, that the Defendant, though Sheriff, ought to give in Evidence, a Copy of the Judgment, but it would have been otherwiſe, if the Treſpaſs had been brought by the Perſon againſt whom the *Fieri facias* iſſued. *Lake* againſt *Billers* and others.

At *Dorcheſter*, *Lent* Aſſizes, 10 *Wil.* 3. 1698.

At a Trial at *Niſi Prius*, it was ruled, that if a Man [b] preſcribes for Common for a certain Number of Cattle, as appurtenant, *&c.* it is not neceſſary, nor material to ſhew that they were *levant* and *couchant*; becauſe it is no

[a] Lord *Raym.* Rep. P. 728.
[c] Lord *Raym.* Rep. P. 733.
[b] Id. 726.

no Prejudice to the Owner of the Soil, for that the Number is aſcertained. *Richards* againſt *Squibb*.

At ſame Time and Place.

It was ruled, that if *A* poſſeſſed [q] of a Term for an hundred Years, grants the Land, *habendum* for forty Years, to begin after his Death; it is a good new Leaſe: And a Man poſſeſſed of a Term for twenty Years, may grant the Lands for nineteen Years, to commence after his Death, and it will be good for ſo many of the twenty Years, as ſhall be unexpired at the Time of his Death.

At *Guildhall*, 1698. 10 *Wil.* 3.

A Bank [r] Bill was payable to *A*, or Bearer, *A* gave it to *B*, *B* loſt it, *C* found it, and aſſigned it over to *D* for valuable Conſideration. *D* went to the Bank and got a new Bill in his own Name; *A* brought *Trover* againſt *D* for the former Bill, and ruled, than an Action did not lie againſt *D*, becauſe he had it for valuable Conſideration.

At *Guildhall*, *May* 31, in *Eaſter* Term, 10 *Wil.* 3. 1698.

In an Action brought [s] upon a Policy of Inſurance of a Ship, if it appears upon the Evidence, that the Ship was condemned by Proceſs of Law, and ſeized; by this Sentence the Property and Ownerſhip are deſtroyed, and there is no Remedy upon the Policy of Inſurance.

At ſame Time and Place.

That in an Action [t] upon a Policy of Aſſurance of a Ship, if the Plaintiff's Witneſs ſwears, that the Ship was

[q] Lord *Raym.* Rep. P. 737.
[r] Lord *Raym.* Rep. P. 738.
[s] Lord *Raym.* Rep. P. 724.
[t] Lord *Raym.* Rep. P. 732.

was condemned by Proceſs of Law, it is good Evidence to prove it; but if the Defendant had offered that Matter in Evidence by his Witneſſes, it would not have been ſufficient without producing the Sentence of Condemnation.

At *Brentwood*, Summer Aſſizes, 10 *Wil.* 3.

It was ruled, upon Evidence at *Niſi Prius*, [u] that if Copyhold Land be ſurrendered to the Uſe of a Will, *&c.* and afterwards the Will deviſes this Land to *B*, and his Heirs, upon Condition that he pay 100*l.* within ſix Months after the Death of the Deviſor to *J. S.* If the Money is not paid, *J. S.* ought to be admitted, and then he muſt make an actual Entry before he can ſurrender, and therefore in the preſent Caſe, a Surrender made by *J. S.* before actual Entry was held ill. *Clerke* againſt *How*.

At *Rygate* in *Surry*, in Summer Aſſizes, 10 *Wil.* 3.

It was held, [u] upon Evidence at a Trial, that Coparceners may join in Ejectment. And that the Caſe in *Moor*, 682, *n.* 939, was not Law. *Boner* againſt *Juner*.

At ſame Time and Place.

It was ruled, upon [x] the Evidence, that becauſe in the Spiritual Court, after Probate of a Will, 6 Months are allowed to regiſter it, and when it is regiſtered, it is regiſtered by the Original, but the Probate is ſigned by the Regiſter only upon the Atteſtation of the Proctor, and the Examination of him; therefore a Will proved in 1666, in the Archdeacon's Court of *London*, and the Office was burnt in the Fire of *London* ſoon after, and the Probate was produced in Evidence to prove

[u] Lord *Raym.* Rep. P. 726.
[x] Lord *Raym.* Rep. P. 732.

prove the Will with all these Circumstances; it was denied to be good Evidence to prove the Will.

At same Time and Place.

It was ruled, that the Service of an Apprenticeship seven Years beyond the Sea, though the Defendant was not bound, excuses from the 5 *Eliz.* Cap. 4. *Frith* [y] against *Torin.*

At Summer Assizes, 10 *Wil.* 3. 1698, at *Canterbury* in *Kent.*

At at a Trial in Ejectment, upon the [z] Evidence it appeared, that a Will was made by *William Horn*, in 1647, of the Lands in Question, which Will was lost, but Mention was made of it in the Calendar (which is the Index of the Register of the Spiritual Court) and also in the Seal-Book. A Commission issued in *April*, 1648, to examine the Executors upon their Oaths, *&c.* and that being returned, Probate was granted the *eleventh* of *May*, 1648, which Probate was produced in Evidence. And the Chief Justice, allowed it to be good Proof of the Will, but he reserved it for his further Consideration. Afterwards the Parties agreed. But he afterwards, as well in the *King's-Bench*, as at *Nisi Prius*, upon other Trials declared, that he held it to be good Evidence, and that he continued of his former Opinion. And he then said, that without Doubt the Register's Book is good Evidence to prove a Will. St. *Leger* against *Adams.*

At *Hertford*, Summer Assizes, 10 *Wil.* 3. 1698.

In Case for stopping the Plaintiff's Lights, the Defendant [a] pleaded, not guilty; and gave in Evidence, that

[y] Lord *Raym.* Rep. P. 738. Cas. Temp. *Holt*, P. 675. pl. 2. *Salk.* P. 67. pl. 5.

[z] Lord *Raym.* Rep. P. 731.

[a] Lord *Raym.* Rep. P. 732.

that the Corporation of *Hertford*, were Lords of the Soil where, *&c.* and preſcribed to ſet up Stalls there, being near the Market-place. And it was admitted to be given in Evidence upon the general Iſſue, becauſe this is to claim Property in the Soil; but where the Defendant, or he under whom he claims, claim only a particular Benefit, as Common, or Eaſement, as a Way, and not the Property in the Soil; he ought to plead it ſpecially, and cannot give it in Evidence upon the general Iſſue pleaded. *Kent* againſt *Wright*.

At ſame Time and Place.

Juſtices [b] of Peace make a Warrant to levy a Poor's Rate upon *J. S.* which was directed to the Conſtables of the Pariſh of *A.* *J. S.* had Land in *A*, upon which he had no Chattels; but his Houſe ſtood in the adjoining Pariſh of *B*, in the ſame County, in which *J. S.* had Goods. The Conſtables of *A* levied theſe Goods by Virtue of the ſaid Warrant, and ruled upon Evidence, at the Trial, that the Goods were well levied. *Hampton* againſt *Lammas*.

Mich. 10 *Wil.* 3.

The [c] Inhabitants of every Pariſh of common Right, ought to repair the High-ways; and, therefore, if particular Perſons are made chargeable to repair the ſaid Ways, by a Statute lately made, and they become inſolvent, the Juſtices of Peace may put that Charge upon the Reſt of the Inhabitants.

Same Term.

He ſaid, [d] that if a Man deſtroys a Thing that is deſigned to be Evidence againſt himſelf, a ſmall Matter will

[b] Lord *Raym.* Rep. P. 735.
[c] Lord *Raym.* Rep. P. 725.
[d] Lord *Raym.* Rep. P. 731.

will ſupply it; and therefore the Defendant having tore his own Note ſigned by him, a Copy ſworn was admitted to be good Evidence, to prove it.

Same Term.

If a Man [e] be hung in Chains upon my Land; after the Body is conſumed, I ſhall have the Gibbet and Chain. Said upon a Motion for a new Trial.

At *Guildhall, ſame Term.*

It was ruled, that if *A* being a Pawn-broker, imploys *B* his Servant, in the Way of his Trade, and *B*, upon Pawn of Goods, lends Money to *C*, *C* tenders the Money to *B* at the Day, and demands the Goods, *B* ſays that the Goods are ſold; *Trover* will lie for *C* againſt *A*. *Jones* [f] againſt *Hart*.

At *Niſi Prius* at *Weſtminſter*, the firſt Sitting after *Michaelmas* Term, 10 *Wil.* 3. 1698.

It was ruled, that every Man [g] of common Right may juſtify the going of his Servants, or of his Horſes, upon the Banks of navigable Rivers, for towing Barges, *&c.* to whomſoever the Right of the Soil belongs. And if the Water of the River impairs and decreaſes the Banks, *&c.* then they ſhall have reaſonable Way for that Purpoſe in the neareſt Part of the Field next adjoining to the River. And he compaired it to the Caſe, where there is a Way through a great open Field, which Way becomes founderous; the Travellers may juſtify the going over the Outlets of the Land not incloſed next adjoining. *Young* againſt ——.

At

[e] Lord *Raym.* Rep. P. 738.

[f] Lord *Raym.* Rep. P. 738, 739. Caſ. *Temp. Holt*, P. 642. pl. 3. *Salk.* 441. pl. 2.

[g] Lord *Raym.* Rep. P. 725.

At *Lent* Aſſizes at *Thetford*, 11 *Will.* 3. 1699.

Depoſitions [g] in *Chancery*, referred to be admitted in Evidence, after the Bill was diſmiſſed. But it was reſerved as a Point for further Conſideration; and after Conſideration, and Conference had with the Practicers in *Chancery*, *Holt* gave his Opinion, that notwithſtanding ſuch Diſmiſſion of the Bill, the Depoſitions were good Evidence. *Smith* againſt *Veale*.

At the Sittings for *Middleſex*, 14 *Feb.* 11 *W.* 3. 1699.

In *indebitatus aſſumpſit* upon a Taylor's Bill, upon *non aſſumpſit* pleaded, and Trial, the Plaintiff produced in Evidence his Shop-book, written by one of his Servants, who was dead. And upon Proof of the Death of the Servant, and that he uſed to make ſuch Entries of Debts, *&c.* It was allowed to be good Evidence, without Proof of the Delivery of the Goods, *&c.* and this was ſaid to be as good Proof, as the Proof of a Witneſs's Hand (who was dead) ſubſcribed to a Bond, *&c.* And notwithſtanding the Statute of 7 *Jac.* 1. Cap. 12. ſays, that a Shop-book ſhall not be Evidence after the Year, yet the Chief Juſtice did not hold ſuch Book to be good Evidence within the Year alone. *Pitman* againſt [h] *Maddox*.

At *Lent* Aſſizes at *Kingſton*, 1699, 11 *Wil.* 3.

It was ruled, that ſuch Leaſe for three Years of Land, as [i] will be good without Deed, within the 29 *Car.* 2. Cap. 3. muſt be for three Years, to be computed from the Time of the Agreement, and not for three Years to be computed from any Day after. *Rawlins* againſt *Turner*.

At

[g] Lord *Raym.* Rep. P. 735.

[h] Lord *Raym.* P. 732, 733. 2 *Salk.* 690. pl. 2. Caſ. *Temp. Holt*, 298. pl. 24.

[i] Lord *Raym.* Rep. P. 736. 12 Mod. 610.

At *Leni* Aſſizes at *Eaſt Grinſtead*, in *Suſſex*, 1699, 11 *Wil.* 3.

In [l] *indebitatus aſſumpſit* upon an *inſimul computaſſet*, and *non aſſumpſit* pleaded, it appeared upon the Evidence at the Trial, that the Debt for which the Account was made, was in Right of *A*, to whom the Plaintiff was Executor. And *Holt* ſeemed to be of Opinion, that it was againſt the Plaintiff; but ordered that it ſhould be ſaved as a Point for his Opinion, and that, in the mean Time, the Plaintiff ſhould have a Verdict ſubject to his Opinion.

At ſame Time and Place.

It was ruled, that if an Anſwer to Interrogatories in [m] *Chancery* be given in Evidence at a Trial, they ought to be proved by the Examiner himſelf, to have been taken the ſame Day that is mentioned upon them. *Goring* againſt *Evelin*.

At *Derby*, Summer Aſſizes, 1699, 11 *Wil.* 3.

Debt [q] againſt the Heir upon the Bond of the Anceſtor, *&c. Riens per diſcent* was pleaded. The Heir gave in Evidence, an Extent againſt him upon a Debt owing by his Father upon Bond to the King. And it was ruled, that a Copy of the Bond ſworn, or the Bond itſelf, ought to be given in Evidence, the Suit being by a Creditor, otherwiſe the Extent ſhould be allowed. And for want of this, ſuch Extent was diſallowed, and next Morning, in another Trial between *Horne* and the ſaid Defendant *Adderley*, the Bond acknowledged by his Anceſtor to the King, was produced in Evidence, the Iſſue being the ſame as in the other Action. *Sherwood* againſt *Adderley*.

[l] Lord *Raym.* Rep. P. 733.
[m] Lord *Raym.* Rep. P. 734.
[q] Lord *Raym.* Rep. 734, 735.

At *Summer* Aſſizes at *Warwick*, 1699, 11 *Wil.* 3.

It was ruled, [s] that if *A* be ſeized of the Manors of *B* and *C*, and during his Seiſin of both, he cauſes a Survey to be taken of the Manor of *B*, and afterwards the Manor of *B* is conveyed to *E*, and after a long Time there are Diſputes between the Lords of the Manors of *B* and *C* about their Boundaries; this old Survey may be given in Evidence; and ſo it was done in this Caſe. *Contra*, if the two Manors had not been in the Hands of the ſame Perſon at the Time of the Survey taken. Sir *John Bridgman* againſt *Jennings*.

At ſame Time and Place.

A Deed [t] was produced, to which there were two Witneſſes, one of whom was blind. It was ruled, that ſuch Deed might be proved without proving that this blind Witneſs is dead, or without having him at the Trial, proving only his Hand; and ſo it was done in this Caſe. *Wood* againſt *Drury*.

At ſame Time and Place.

Upon a Trial at *Niſi Prius*, it was ruled, [t] that if *A*, not having any Thing in certain Land, demiſes it by Indenture to *B*, and afterwards *A* purchaſes the Land, this will be a good Leaſe by Eſtoppel. But if it appear by Recitals in the Leaſe, that *A* had nothing at the Time of the Demiſe, and afterwards he purchaſes the Land as aforeſaid, that will not enure by Eſtoppel. *Hermitage* againſt *Tomkins*.

At ſame Time and Place.

If the [u] Sheriff upon an Extent for the King againſt *A*, ſeizes the Goods of *B*, *B* cannot have *Trover* againſt the

[s] Lord *Raym.* Rep. P. 734.
[t] Lord *Raym.* Rep. P. 729.
[u] Lord *Raym.* Rep. P. 736.

the Sheriff, becauſe by the Seizure, the Property veſted in the King. The King againſt *Woodward*.

At ſame Time and Place.

An [y] Extent in Aid, found *Andrews* Debtor to the King, and *Thomas Woodward* Debtor to *Andrews*; upon which the Goods of *Thomas Woodward* were ſeized in the Hands of *John Woodward*; *John Woodward* came in, and traverſed the Inquiſition, that they were not the Goods of *Thomas Woodward*, but of himſelf, and the Verdict was for Part for the King, and for Part for the Defendant. And the Queſtion was, who ſhould pay the Fees in Court, *&c.* becauſe the Defendant is Actor, for if it were found for the King, no Judgment ſhould be given; but if, *&c.* for the Defendant, an *amoveas Manus* muſt be awarded. And it was ruled, that the Defendant ought to pay the Fees. *Same Caſe.*

At Summer Aſſizes at *Lincoln*, 1699, 11 *Wil.* 3.

Ruled in Evidence, at a Trial, in an Action of falſe Impriſonment;

If *A* [z] has a Chamber adjoining to the Chamber of *B*, and has a Door that opens into it, by which there is a Paſſage to go out; and *A* has another Door which *C* ſtops, ſo that *A* cannot go out by that, that this is no Impriſonment of *A*, by *C*, becauſe *A* may go out by the Door in the Chamber of *B*, though he be a Treſpaſſer by doing it. But *A* may have a ſpecial Action upon his Caſe againſt *C*; the Plaintiff was nonſuit. *Wright* againſt *Wilſon*.

[y] Lord *Raym.* Rep. P. 736.
[z] Lord *Raym.* Rep. P. 739.

At the same Time and Place, and at *Aylesbury*.

If *H*[y] has Possession of Land for twenty Years uninterrupted, and then *B* gains Possession, upon which *H* brings Ejectment; though *H* is Plaintiff, yet his Possession for twenty Years will be a good Title for him, as well as if *H* had been then in Possession; because Possession for twenty Years now, by Virtue of the Statute, 21 *Jac.* 1. Chap. 16. is like a Descent at Common Law, which tolls the Entry. *Stocker* against *Berny*.

At *Lent* Assizes at *Thetford*, 16 *March*, 12 *Wil.* 3. 1700.

It was ruled, upon Evidence, at a Trial at *Nisi Prius*, that a Ship-Carpenter is within the Statutes of Bankrupts; but a Case was made of it for the Chief Justice's farther Consideration.

2. He held, that if *A* becomes Bankrupt, and then sells Goods to *B*. *B* sells them to *C*, which is a Conversion; then a Commission of Bankrupt is sued, and an Assignment made by the Commissioners to *E*, who brings *Trover* against *C*, the Action well lies; but that Point was also reserved for his Consideration.

3. If the Petition to the Lord Chancellor, mentioned in the Declaration recites, that the Bankrupt was indebted in 300*l.* and the Petition produced at the Trial recites, that he was indebted in 150*l.* yet that is no material Variance.

4. There is no need to produce, at the Trial, the Petition made to the Lord Chancellor, because it may have been by Parol, though the Practice hath been otherwise. *Kirne* against *Smith* and others.

At

[y] Lord *Raym.* Rep. P. 741.

At the Aſſizes at *Bury*, in *Lent*, 12 *Will.* 3. 1700.

A [n] demiſed Ground to *B*, which was Paſture, except the Trees; *B* put in his Cattle to feed, which barked the Trees; *A* cannot have [o] Treſpaſs againſt *B*. *Glenham* againſt *Hanby*.

At *Lent* Aſſizes, 12 *Wil.* 3. 1700, at *Bedford*.

In [p] Caſe upon a ſpecial Promiſe, to deliver good merchandiſable Wheat, upon *non aſſumpſit* pleaded; at the Trial, the Plaintiff's Witneſs ſwore, that it was agreed, that he ſhould deliver good ſecond Sort of Wheat; and held this a Variance, and the Plaintiff was nonſuited.

At *Norwich*, Summer Aſſizes, 12 *Wil.* 3. 1700.

It was ruled, upon Evidence, at a Trial at *Niſi Prius*, that if in *indebitatus aſſumpſit* for Goods, [q] ſold and delivered, upon *non aſſumpſit* pleaded, the Defendant gives in Evidence, that the Debt was attached by foreign Attachment in *London*, upon a Plaint levied by *J. S.* (to whom the Plaintiff was indebted) againſt the Plaintiff, *&c.* the Defendant will be driven to prove, that the Plaintiff was indebted to *J. S.* becauſe the Plaintiff has no Notice of the foreign Attachment; and therefore it may be only a Contrivance by the Defendant and *J. S.* to bar the Plaintiff of his preſent Action.

2. In ſuch Caſe, the Plaintiff may ſhew in Evidence, that the Suit in *London* was after an Original filed by the Plaintiff in ſome one of the ſuperior Courts; and that will avoid the Operation of the foreign Attachment. 3. If

[n] Lord *Raym.* Rep. P. 739.

[o] This was ruled upon a Point, made and referred to the Chief Juſtice, upon hearing Council ſeveral Times; Note, at firſt he was of a contrary Opinion. Lord *Raym.* Rep. P. 739.

[p] Lord *Raym.* Rep. P. 735.

[q] Lord *Raym.* Rep. P. 727.

3. If the Original did not iſſue before the Plaint was entered in *London*, but only was antedated, and bore *Teſte* before, and no Arreſt was made before upon it; that will not avoid the foreign Attachment. But this latter Point *Holt* reſerved for his farther Conſideration. But (as Lord Chief Juſtice [a] *Raymond* heard) he was afterwards of the ſame Opinion. *Palmer* againſt *Hooke* or *Gouche*.

At ſame Time and Place.

Ruled upon Evidence, at a Trial in falſe Impriſonment, that the [b] Officer cannot juſtify the Impriſonment of a Man for Non-payment of Taxes under the general printed Warrant, which the Collectors have, ſigned by two Juſtices of Peace; but they ought to have a ſpecial Warrant. *Maſters* againſt *Butcher*.

At *Bury*, Summer Aſſizes, 12 *Wil.* 3. 1700.

In an Indictment [c] for Forgery at Common Law, tho' it is not ſhewn, that the Party was prejudiced, yet the Indictment is good. *Contra*, in an Action of *forger des faux Faits*. Therefore where the Indictment was for Forgery of a Surrender of the Lands of *J. S.* and it was not ſhewn in the Indictment, that *J. S.* had any Lands; yet upon Motion in Arreſt of Judgment it was held good; and Judgment was given againſt the Defendant, being an Attorney, that he ſhould ſtand in the Pillory. Another Exception was, that the Indictment was, *quod falſo contrafecit Scriptum*, which is repugnant; yet held good. *The King* againſt *Goate*.

June

[a] Lord *Raym.* Rep. P. 727.
[b] Lord *Raym.* Rep. P. 740.
[c] Lord *Raym.* Rep. P. 737.

June 4, 1700, at *Guildhall*, at *Niſi Prius*.

If a [1] Ship be bound for the *Eaſt-Indies*, and from thence to return to *England*, and the Ship unlades at a Port in the *Eaſt-Indies*, and takes Freight to return to *England*, and in her Return ſhe is taken by the Enemies; the Mariners ſhall have their Wages for the Voyage to the *Eaſt-Indies*, and for half the Time that they ſtayed there to unlade, and no more.

At the Sittings at *Weſtminſter*, 13 *February*, 12 *Wil.* 3. 1700.

Mr. *R. Vaughan* [2] ſent a Box with an hundred Guineas, &c. in it, by *Tiley*, the *Bath* Carrier, to *London*, upon which Box, the Direction was only, "To Mr. *Vaughan*, Member of Parliament". *Tiley* carried the Box to *London*, and upon his Arrival, *Cowling*, an Inn-keeper in *Piccadilly*, came to *Tiley*'s Inn for Goods directed to be left at *Cowling*'s Houſe. Afterwards, this Box being loſt, *Tiley* pretended that it was delivered to *Cowling* among other Goods, upon which *Tiley* brought an Action of *Trover* againſt *Cowling*; and at the Trial, Mrs. *Vaughan*, the Wife of Mr. *Vaughan*, was produced to be a Witneſs, to prove what was in the Box, and *Holt* refuſed to admit her to be a Witneſs; becauſe, whether *Tiley* recovered or not, this Verdict might be given in Evidence by Mr. *Vaughan*, in an Action to be brought by him againſt *Tiley*, with Oath made of what was ſworn for *Tiley* in this Trial. *Tiley* againſt *Cowling*.

At *Guildhall*, *Nov.* 23. *Mich.* 12 *Wil.* 3. 1700.

In Caſe [3] upon a Bill of Exchange, upon the Evidence at the Trial, the Caſe was thus. *A* drew a Bill of Ex-

[1] Lord *Raym.* Rep. P. 739.
[2] Lord *Raym.* Rep. P. 742, 743.
[3] Lord *Raym.* Rep. P. 744.

Exchange upon *B*, payable to *C*, at *Paris*; *B* accepted the Bill, *C* indorſed it, payable to *D*; *D* to *E*; *E* to *F*; *F* to *G*; *G* demanded the Bill to be paid by *B*, and upon Non-payment, *G* proteſted it within the Time, *&c.* and then *G* brought an Action againſt *D*, and it was well brought, and he recovered. Afterwards, *D* brought an Action againſt *B*, and though *D* produced the Bill and the Proteſt, yet, becauſe he could not produce a Receipt for the Money paid by him to *G* upon the Proteſt, as the Cuſtom is among Merchants, as ſeveral Merchants upon their Oaths affirmed, he was nonſuit. But *Holt* ſeemed to be of Opinion, that if he had proved Payment by him to *G*, it had been well enough. *Mendez* againſt *Carreroon*.

At *Maidſtone*, *Lent* Aſſizes, 13 *Wil.* 3. 1701.

William Denne, [f] poſſeſſed of a Farm for a thouſand Years, aſſigned it to *Ralph Philpot*, for a collateral Security, againſt a Bond in which *Philpot* was bound jointly with *Denne* for the Debt of *Denne*, in 1655. *Philpot* died, leaving *R. Philpot*, his Son, his Executor. *William Denne* died, leaving *Katherine Denne*, his Wife, his Executrix, and *Katherine Denne*, his Daughter, his Heir. In 1674, *R. Philpot*, Executor of *Ralph Philpot*, and *Katherine Denne*, the Executrix of *William Denne*, and *Katherine Denne*, the Heireſs of *William Denne*, aſſigned this Term of a thouſand Years to *John Harriſon*, with Condition, that upon Payment of 20*l.* the Conſideration of the ſaid Aſſignment, by *Katherine Denne*, the Executrix, *&c.* *Katherine Denne* received the Profits till 1691, and ſhe paid the Intereſt to the ſame Time. And it was ruled, in an Ejectment brought by the Executor of *Harriſon*.

1. That

[f] Lord *Raym.* Rep. P. 740.

1. That he was not barred by the Statute of Limitations, becauſe the Statute did not prejudice at the Time of the Aſſignment, there being but nineteen Years elapſed; and then the joining of him in the Aſſignment, who had the Title to take the Advantage of the Statute, gives a new Title.

2. If a Man makes a Mortgage for collateral Security, although the Mortgagee is not in Poſſeſſion for twenty Years and more; yet, if the Intereſt be paid upon the Bond, according to the Agreement of the Parties, it ſhall not be barred by the Statute of Limitations. *Hatcher* againſt *Fineux*.

At ſame Time and Place.

Debt for Rent.[a] Upon *nil debit* pleaded, the Plaintiff gave in Evidence, a Note in Writing, by which the Defendant was to hold for one Year, rendering Rent of 15*l.* and, in Fact, he was Grantee of a Reverſion expectant upon an Eſtate for Life, which Life was dead at the Time of the giving of the Note, which Grant was forty Years before, and he was never in Poſſeſſion, but the Tenant for Life was all the Time in Poſſeſſion during his Life. The Defendant gave in Evidence, a Prior Grant of the ſaid Reverſion. And it was ruled, that the Defendant, in this Caſe, may give in Evidence, *nil habuit in tenementis*, the Plaintiff having never been in Poſſeſſion, notwithſtanding the Note ſigned by the Defendant, by which he agreed to hold, *&c.* but if the Plaintiff had been in Poſſeſſion, though but Tenant at Will, *&c.* then the Defendant could not have given this in Evidence, without having been evicted. Plaintiff was nonſuit. *Cheſtle* againſt *Pound*.

[a] Lord *Raym.* Rep. P. 746.

At the Sitting in *Middleſex*, after *Eaſter* Term, 13 *Wil.* 3. 1701.

A Jewel [h] cannot be an Heirloom, but only Things ponderous, as Carts, Tables, *&c.* Ruled, in *Trover*, for a Chain of Pearl. See *Co. Lit.* 18. *b.* That the antient Jewels of the Crown are Heir-looms. Lord *Petre* againſt *Heneage.*

Trinity, 13 *Wil.* 3. 1701, *Guildhall*, *London.*

In Debt [k] upon Bond, brought againſt the Defendant, as Heir to his Father, *&c.* *Riens per diſcent* pleaded, the Plaintiff replied Aſſets, and Iſſue thereupon. And the Evidence was, that the Obligor, the Defendant's Father, deviſed to the Defendant, his Son and Heir, certain Meſſuages in *Exchequer-alley* in Fee, but chargeable with an Annuity, or Rent-charge, payable to the Defendant's Mother. And it was held, that theſe Meſſuages deſcended to the Defendant, and were Aſſets. For the Difference is, where the Deviſe makes an Alteration of the Limitation of the Eſtate, from that which the Law would make by Deſcent; and where the Deviſe conveys the ſame Eſtate, as the Law would make by Deſcent, but charges it with Incumbrances. In the former Caſe, the Heir takes by Purchaſe, in the latter by Deſcent. *Emerſon* againſt *Inchbird.*

At *Brentwood*, Summer Aſſizes, 13 *Wil.* 3. 1701.

In Caſe for Words, [l] which imported the committing of Adultery by the Plaintiff, with *Jane at Stile*, the Defendant, in Mitigation of Damages, may give in Evidence, that the Plaintiff committed Adultery with

[h] Lord *Raym.* Rep. P. 728.
[k] Lord *Raym.* Rep. P. 728.
[l] Lord *Raym.* Rep. P. 727.

with *Jane at Stile*, but not with any other Woman. *Smithies* againſt Dr. *Harriſon*.

At the Summer Aſſizes at *Horſham* in *Suſſex*, 13 *Wil.* 3. 1701.

Claxmore [m] brought an Ejectment againſt *Searle*, *Field*, and *Falkner*; *Field* appeared, and confeſſed Leaſe, Entry, and *Ouſter*. *Searle* and *Falkner* did not appear, nor confeſs Leaſe, Entry, and *Ouſter*. Upon which, by the Direction of *Holt*, Verdict was given by the Jury for the Plaintiff againſt *Field* generally; and Verdict was given againſt the Plaintiff for *Searle* and *Falkner*; and Indorſement was made upon the *Poſtea*, that this Verdict was for *Searle* and *Falkner*, becauſe they did not appear and confeſs Leaſe, Entry, and *Ouſter*: And for this Reaſon, that they ſhould not have Coſts againſt the Plaintiff, and that the Plaintiff ſhould have Judgment againſt the caſual Ejector, for ſuch Land as were in the Poſſeſſion of *Searle* and *Falkner*. *Claxmore* againſt *Searle*, *Field*, and *Falkner*.

At *Guildhall*, the Sitting after *Hilary* Term, 1 *Anne*, 1702.

Depoſitions [o] in *Chancery*, admitted in Evidence after the Bill was diſmiſſed. *Smith* againſt *Veale*.

At *Hertford*, *Lent* Aſſizes, *Mar.* 25, 1702, 1 *Anne*.

In *aſſumpſit* [p] upon *non aſſumpſit infra ſex annos* pleaded, the Evidence was, that after the ſix Years the Defendant aſſumed to pay, if the Plaintiff would come to Account. And it was ruled, that this did not revive the Promiſe, becauſe it was not an actual Promiſe. *Sparling* againſt *Smith*.

At

[m] Lord *Raym.* Rep. P. 729.
[o] Lord *Raym.* Rep. P. 735.
[p] Lord *Raym.* Rep. P. 741.

At *Lent* Aſſizes at *Maidſtone*, in 1702, 1 *Anne*.

In Ejectment upon the Trial, [a] the Copy of the Regiſter of a Will was produced in Evidence, to prove a Pedigree, and not to derive any Title by the Will; and alſo the Probate of the ſame Will was offered for the ſame Purpoſe. But they were refuſed to be admitted. For,

1. As to the Probate, it is only Evidence of a Will as to Chattles.

2. *Holt* ſaid, that there was the ſame Reaſon to admit the Copy of the Regiſter to be Evidence, as the Copy of Court-rolls, or of a Regiſter of a Church; but the Practice has been always otherwiſe, which he would not ſubvert; and therefore the Copy of the Regiſter not being Evidence to prove the Will, it cannot prove the Pedigree, becauſe that depends upon the Credit of its being a Will, which is not proved by the Copy of the Regiſter; therefore the Evidence was denied to be admitted by him. *Dike* againſt *Polhill*.

At *Guildhall*.

The [a] Servants of a Carman run over a Boy in the Streets, and maimed him by Negligence; and an Action was brought againſt the Maſter, and the Plaintiff recovered. The Servants of *A.* with his Cart, run againſt

AN ALPHABETICAL

TABLE of REFERENCES

To all Lord Chief Juſtice *HOLT*'s

ARGUMENTS and RESOLUTIONS

IN THE

Several Volumes of REPORTS, digeſted under proper general Heads.

PREFACE.

LORD Chief Juſtice *Holt*'s Arguments and Reſolutions, were the Glory and Happineſs of the Age in which they were pronounced, they have been the Guide and Imitation of ſucceeding ones, and will continue to be ſo to all future ones. *England* is as much obliged to his Lordſhip's Adminiſtration, as to the Law itſelf: For though the Law is projected upon the fineſt Polity in all the known World; yet, without a Magiſtrate, it is but a dead Letter: Let it's Excellency be what it will, it's good Influence and Effects will entirely depend upon the Integrity and Abilities of thoſe who are to carry it into Execution.

The following Table is calculated to refer the Reader to innumerable Inſtances of that Integrity, and of thoſe Abilities. The Plan, the Author confeſſes, he took from the Table at the End of *Jacob*'s Law Dictionary, which he flatters himſelf he has much improved. The Books having an Aſteric before them, were either not publiſhed when *Jacob* wrote, or omitted by him. The Account of the reſpective Authors in the Notes, it is hoped, will be uſeful as well as amuſing.

C.

Carth. (a)	——	*Carthew*'s Reports. 1728.
* Caſ. *Temp. Holt*, (b)		Caſes determined while *Holt* was Chief Juſtice. 1738.
Comb. (c)	——	*Comberbach*'s Reports. 1724.
* *Com.* Rep. (d)	——	*Comyn*'s Reports. 1744.

F.

* *Forteſc.* Rep. (e)	—	*Forteſcue*'s Reports. 1748.
* *Freem.* (f)	——	*Freeman*'s Reports. 1742.

K.

Kel. (a) —— *Kelyng*'s Reports. 1708.

L.

Lev. (b) —— *Levinz*'s Reports. 1702.

M.

3, 4, 5. Mod. (c) — Modern Reports. 1757.
6. Mod. (c) —— Modern Cases. 1757.
7. Mod. (c) —— Modern Cases by *Farresley*. 1757.
* 11. Mod. (c) — Cases in the *King's-Bench*. 1737.
* 12. Mod. (c) — Cases in King *William* the *third*'s Reign. 1741.

R.

* 1, 2. Lord *Raym.* (d) Lord Chief Justice *Raymond*'s Reports. 1743.

S.

1, 2. *Salk.* (e) —— *Salkeld*'s Reports. 1742.
* 3. *Salk.* —— Id. 1724.
* Set. and Rem. — Cases of Settlements and Removals. 1742.
Show. Rep. (f) —— *Shower*'s Reports. 1708.
Skin. —— —— *Skinner*'s Reports. 1728.
* *Stra.* Sel. Cas. Evid. (g) Select Cases of Evidence, by Sir *John Strange*. 1754.

W.

* *Wil.* Rep. —— *Peere Williams*'s Reports. 1740.

N. B. No Books are referred to, but such wherein the Reporter expressly says, that the Argument or Resolution was the *Dictum* of the Chief Justice.

(a) He was called to the honorary Degree of a Serjeant at Law, 1 *Oct.* 1701, 13 *Wil.* 3. Append. to *Chron. Juridicial.* P. 7.

(b) *Jacob*, who wrote the Law Dictionary, is reputed the Collector, or at least the Publisher of it.

(c) He was Recorder of the City of *Chester*, and one of the Justices of *North-Wales*. See the Title Page of his Reports.

(d) He

(c) He was called to the honorary Degree of a Serjeant at Law, 8 *June*, 1705, 4 *Anne*. Append. to *Chron. Juridicial.* P. 7. On *Monday*, 7 *Nov.* 1726, 13 *Geo.* 1. he was sworn a Baron of the *Exchequer*, in the Room of Mr. Baron *Page*, who on *Friday*, *Nov.* 4, preceeding, was sworn a Judge of the *Common Pleas*, in the Room of Mr. Justice *Tracy*, (who resigned his Office by Reason of his ill State of Health, and his Majesty, as a Reward for his past Services, granted him a Pension of 1500*l. per Annum.*) Lord *Raym.* Rep. 2 Vol. P. 1420. *Bunb.* Rep. P. 221. Append. to *Chron. Juridicial.* P. 15. In *January*, 1735, 8 *Geo.* 2. he was made one of the Judges of the *Common Pleas*. *Bunb* Rep. P. 341. Append. to *Chron. Juridicial.* P. 19. On 7 *July*, 1738, 11 *Geo.* 2. before *Mich.* Term, he received the Lord the King's Letters Patent, dated the same Day, appointing him Chief Baron of his *Exchequer*. *Com.* Rep. P. 587. *Bunb.* Rep. P. 343. Append. to *Chron. Juridicial.* P. 19.

(d) On *Friday*, *Oct.* 22, 1714, 1 *Geo.* 1. he was appointed Solicitor General to his Royal Highness the Prince of *Wales*. Lord *Raym.* Rep. 2 Vol. P. 1318, 1319. *Stra.* Rep. P. 1. *January* 24, 1716, 3 *Geo.* 1. he was made a Baron of the *Exchequer*. *Bunb.* Rep. P. 10. Append. to *Chron. Juridicial.* P. 13. *May* 15, 1718, 5 *Geo.* 1. he was made a Judge of the *King's-Bench*, *Bunb.* Rep. P. 22. *Stra.* Rep. P. 86. Append. to *Chron. Juridicial.* P. 13. His Patent was superseded by his late Majesty, King *George* the *Second*. Lord *Raym.* Rep. 2 Vol. P. 1510. 27 *Jan.* 1728, 2 *Geo.* 2. he was constituted one of the Justices of the *Common Pleas*. Append. to *Chron. Juridicial.* P. 17. List of Chief Justices, &c. in P. 260. of 4 Vol. of *Tind.* Rap. Hist. *Engl.* Edit. 1747.

(e) He was Lord Chancellor of *Ireland*, in the Year 1706, 5 *Anne*. See Preface to his Reports.

(f) Mr. Justice *Foster* tells us, that Lord Chief Justice *Holt* published these Reports. *Fost.* Cr. Law, P. 204. *Kelyng* was of the *Inner-Temple*, and called to the honorary Degree of a King's Serjeant at Law, [6 *Nov. Dugd. Chron.* Ser. P. 115. *Chron. Juridicial.* P. 20.] in *Michaelmas* Term, 13 *Char.* 2. 1661. He gave Rings with this Inscription, *a Deo Carolvs Magnvs*, the large Letters [*MDCLVV*] made the Year [of the Restoration] 1660. *Sid.* Rep. P. 4. *Show.* Rep. 2 Vol. P. 102. pl. 99. He was made one of the Judges of the *King's-Bench*, 18 *June*, 1663. *Dugd. Chron.* Ser. P. 114. *Chron. Juridicial.* P. 201. in the Room of Sir *Tho. Mallet*, who retired from Town to his Country Seat; having first petitioned the King to dispense with his Attendance, by Reason of his great Age, which the King granted, and also continued to him his Patent and Salary, and so there were five Judges, tho' but four attended. *Sid.* Rep. P. 150. pl. 15. He was constituted Chief Justice of the *King's Bench*, 21 *Nov.* 1665, 17 *Car.* 2. *Dugd. Chron.* Ser.

Ser. P. 116. *Chron. Juridicial.* P. 201. *Sid.* Rep. P. 275. pl. 1. In *Mich.* Term, 1669, 21 *Char.* 2. Mr. Serjeant *Powys* coming to the *King's-Bench* Bar, who was the Junior of 17 who had been made a Day or two before in that Term; the Lord Chief Juſtice *Kelyng* told him, that he had ſomething to ſay to him, *viz.* That the Rings, which he and the Reſt of the Serjeants had given, weighed but eighteen Shillings apiece, whereas *Forteſcue*, in his Book "*De Laudibus Legum Angliæ*," [Chap. 50, P. 414, Edit. 1741] ſays, "*That the Rings given to the Chief Juſtices, and to the Chief Baron, ought to weigh twenty Shillings apiece.*" And that he ſpake not this expecting a Recompence, but that it might not be drawn into a Precedent; and that the young Gentlemen there, might take Notice of it. Mod. Rep. P. 9. pl. 30. He is ſaid to have prepared the Act of Uniformity. [Stat. 13 & 14 *Char.* 2. Cap. 4.] *Burnet's* Hiſt. own Times, P. 184.

About the Year 1666, the Lord Chief Juſtice *Kelyng* was queſtioned in Parliament for over-awing and putting a Reſtraint upon Juries; and the Houſe came to ſeveral Reſolutions upon his Caſe, and ordered him to be proſecuted; but by Reaſon of the Houſe's being prorogued, and he himſelf, not long after, dying in Diſcontent, we do not find there were any further Proceedings made therein. Pref. to *Forteſc. de Laudibus*, &c. XIII. Triumphs of Juſtice, Fol. *Lond.* 1681. P. 29, 36.

Siderfin ſays, the Complaint was for Miſdemeanors done in his Office, as *fining* Juries, *&c.* that there was an Inquiry made into them, and the Chief Juſtice appeared in Perſon before the Committee, and alſo in the *Houſe of Commons*, and afterwards he was diſcharged. *Sid.* Rep. P. 338. pl. 1.

Lord Chief Juſtice *Kelyng* was obliged to make *Denzel*, Lord *Holles*, Satisfaction for the Affront put upon his Lordſhip by him, at the Trial of certain *French* Gentlemen, (for a Robbery) in the Court of *King's-Bench*, in *Eaſter* Term, 1670, 22 *Char.* 2. The Affront was, that when Lord *Holles* attempted to ſpeak to the Characters of the *Frenchmen*, the Chief Juſtice ſtopped him, ſaying, he muſt not interrupt the Court; and Lord *Holles* replying, that it was neither to interrupt the Court nor to do them any Wrong, to inform them as much as poſſible of all Paſſages, *&c.* The Chief Juſtice anſwered again, very angrily, *My Lord, you wrong not the Court, but you wrong yourſelf; and it is not the firſt Time you have been obſerved to appear too much for Strangers.* "So, ſays Lord *Holles*, I was ſnubbed and ſet down again, but I muſt ſay it was Language I had not been uſed to, nor, I think, any of my Condition, that had the Honour to ſerve the King, in the Quality I do, of a Privy Councellor." The Lord Chief Juſtice alſo, upon *Walrond's* Evidence, declared (looking fully at Lord *Holles*, whence the whole Court underſtood it to be meant of him) *that there had*

been

been some foul doings. Upon these Injuries, he petitioned the House of Lords, who on *Friday, March* 10, 1670, made the following Order. " This Day the Lord *Holles* produced several Witnesses to be examined concerning his Complaint on his Petition of several Indignities put upon him by the Lord Chief Justice of the *King's-Bench*, at the Trial of some *French* Gentlemen in the said Court of *King's-Bench*, who were there falsely accused of a Robbery by four Butchers in *Easter* Term last. After the Hearing of which Witnesses, the Lord Chief Justice made his Defence, and denied, that he intended any Thing against the Lord *Holles*, when he spoke those Words at the said Trial, that it was a foul Contrivance, *&c.* as in the Petition is set forth; to which Defence the Lord *Holles* made a short Reply, and then voluntarily withdrew himself, and the Lord Chief Justice withdrew himself also. Upon which the House took the whole Matter into serious Consideration, and ordered, that the Lord Chief Justice should be called to his Place as a Judge; and openly (in the Presence of the Lord *Holles*) the Lord-Keeper should let him know, that this House is not satisfied, with his Carriage toward the Lord *Holles* in this Business, and therefore has ordered, that he should make this Acknowledgment, which is to be read by the Clerk as followeth, that he did not mean it of the Lord *Holles* when he spoke these Words (that it was foul Contrivance) and that he is sorry, that by his Behaviour or Expressions, he gave any Occasion to interpret it otherwise, and asks the Pardon of this House and the Lord *Holles*. Then the Lord Chief Justice of the Court of *King's-Bench* was called to his Place, and (the Lord *Holles* being also present) the Lord Keeper performed the Directions of the House, and the Lord Chief Justice read the Acknowledgment aforesaid, only changing the Stile into the first Person."

John Brown, Cleric. Parliamentorum.

Journal-Book of the House of Peers, *Anno* 1671. See " *A true Relation of the unjust Accusation of certain* French *Gentlemen charged with a Robbery (of which they were most innocent) and the Proceedings upon it, with their Trial and Acquittance in the Court of* King's-Bench, *in* Easter *Term last, published by* Denzel *Lord* Holles, *partly for a further Manifestation of their Innocency (of which, as he is informed, many do yet doubt) and partly for his own Vindication, in Regard of some Passages at that Trial, which seemed very strongly to reflect upon him.*" *Lond.* 1671, Quarto, 44 Pages. The Chief Justice died in *Easter* Term, 23 *Char.* 2. Sir *Tho. Jones*'s Rep. P. 42. *Ventr.* P. 113.

(k) He was 25 *Oct.* 1679, 31 *Char.* 2. appointed his Majesty's Attorney General. Sir *Tho. Raym.* Rep. P. 312. 2 *Show.* Rep. P. 85. 12 *Feb.* in *Hil.* Term, 32 & 33 *Char.* 2. 1680-1. he was called to the honorary Degree of a Serjeant at Law, and gave Rings

Rings with this Inſcription, "*Regi ſervire, Jura ſervare.*" Sir *Tho. Raym.* Rep. P. 430. 7 *Feb.* 1684, 1 *Jac.* 2. he was conſtituted one of the Juſtices of the *Common Pleas*. *Chron. Juridicial.* P. 209. He was afterwards removed, *Lev.* Rep. 3 Vol. P. 257. and came to the Bar again. *Show.* Rep. 2 Vol. P. 471. pl. 437. He died 29 *Jan.* in *Hil* Term, 1700-1, 12 & 13 *Wil.* 3. at *Serjeant's-Inn* in *Fleet-ſtreet*. Lord *Raym.* Rep. P. 622.

(†) Theſe are eſteemed good Reports.

(*) They are the beſt Reports extant in *civil* Caſes. The Author of them was ſworn Solicitor General on *Saturday*, *May* 13, 9 *Anne*, 1710, at the Lord Chancellor *Cowpers*. Lord *Raym.* Rep. 2 Vol. P. 1309. On *Thurſday*, *Oct.* 14, 1714, 1 *Geo.* 1. a *Superſedeas* paſſed the Great Seal, to remove Sir *Robert Raymond* from being Solicitor General. Lord *Raym.* Rep. 2 Vol. P. 1318. On 9 *May*, 1720, 6 *Geo.* 1. he was declared Attorney General. *Gazette*, N°. 5849. On *Friday*, 31 *Jan.* 1723, 10 *Geo.* 1. he was called to the honorary Degree of a Serjeant at Law. Append. to *Chron. Juridicial.* P. 15. The Motto of his Ring was "*Salvâ—Libertate potens. Lucan.*" He was the ſame Evening, ſworn one of the Juſtices of the Court of *King's-Bench*, at the Lord Chancellor's Houſe in *Lincoln's-Inn Fields*; in the Room of Sir *Robert Eyre*, who in the *Mich.* Vacation before, had been made Lord Chief Baron of the *Exchequer*, in the Room of the late Lord Chief Baron *Montague*, who died in *Mich.* Term. Sir *Robert* took his Place on *Monday*, *February* 3, 1723. Lord *Raym.* Rep. 2 Vol. P. 1331. *Gazette*, N°. 6239. The Earl of *Macclesfield* ſurrendering the Great Seal into his Majeſty's Hands, 7 *January*, 1724-5, 11 *Geo.* 1. He was pleaſed to deliver it in Council, at St. *James's*, to Sir *Joſeph Jekyll*, Knight, Maſter of the Rolls, Sir *Jeffery Gilbert*, Knight, one of the Barons of the *Exchequer*, and to Sir *Robert Raymond*, Knight, one of the Juſtices of the *King's-Bench*, where they took their Oaths of Office, as Lords Commiſſioners for the Cuſtody of the Great Seal. *Stra.* Rep. P. 619. *Gazette*, N°. 6363.

Note; there is a Chaſm in Sir *Robert's* Reports of *Hilary* Term, 1724-5, he attending all that Term in Chancery, as one of the Commiſſioners of the Great Seal. Lord *Raym.* Rep. 2 Vol. P. 1380.

Sir *Robert* was created Lord Chief Juſtice of the *King's-Bench*, (in the Room of Sir *John Pratt*, Knight, deceaſed, Father of the preſent Chief Juſtice of the *Common Pleas*) by a Writ, bearing *Teſte*, *March* 2, 1725, 11 *Geo.* 1. *Gazette*, N°. 6351, and was ſworn into the Office, *March* 3, following, before the ſaid Sir *Joſeph Jekyll*, and Sir *Jeffery Gilbert*, then two of the Lords Commiſſioners of the Great Seal, at the *Rolls*: notwithſtanding which, I was, (ſays Sir *Robert*) continued one of the Lords Commiſſioners. Lord *Raym.* Rep. 2 Vol. P. 1381. and on 25 *April*, 1725, was ſworn at St. *James's* of

of his Majesty's most honourable Privy-Council. *Gazette*, N°. 6363.

Sir *Rob. Raymond* seeming to remark it as something extraordinary that he should be continued one of the Commissioners of the Great Seal, after his being created Chief Justice of the *King's-Bench*, it was thought proper to give the Readers some Instances of the like Kind.

Sir *John Knevet*, Knight, was Chief Justice of the *King's-Bench*, and Chancellor together, in *Edward* the *third's* Time. *Spelm.* Gloss. P. 111, 342. *Dugd.* Chron. Ser. P. 48, 50. *Forteſc.* Rep. P. 382, 383. *Chron. Juridicial.* P. 101, 105. *Dy.* P. 159. in Marg. *Co.* Rep. P. 58.

Humphry Starkie held the Places of Chief Baron of the *Exchequer*, and Justice of the *Common Pleas*, both together, in the Reign of *Henry* the *seventh*. *Spelm.* Gloss. P. 344. *Dugd.* Chron. Ser. P. 74. *Chron. Juridicial.* P. 141. *Forteſc.* Rep. P. 382. *Dy.* P. 159. Year-Book, 1 *Hen.* 7. P. 10. pl. 13.

Sir *Richard Brooke*, Knight, was both Chief Baron of the *Exchequer*, and a Justice of the *Common Pleas* at the same Time, to *Henry* the *eighth*. *Spelm.* Gloss. P. 344. *Dugd.* Chron. Ser. P. 80. *Chron. Juridicial.* P. 153, 155. *Forteſc.* Rep. P. 382.

Sir *James Dyer*, Knight, was made Judge of the *King's-Bench*, in *Easter* Term, 4 & 5 *Phil.* & *Mar.* being then a Judge of the *Common Pleas*; and the Question was, whether by the Acceptance of this last Patent, the Force and Effect of the former was not ceas'd? And held by the Majority of the Judges, it was gone, because an inferior Authority is taken away and sunk by the superior Authority, as a Benefice becomes void by the Incumbent's taking a Bishoprick, [*Latch.* Rep. P. 32.] so the Authority of the *King's-Bench* drowns all other inferior Authority; besides, it is absurd and impertinent for a Man to reverse his own Judgment, as he should do in this Case, if a Writ of Error was brought in the *King's-Bench* of a Judgment in the *Common Pleas*. *Dy.* P. 158 *b.* P. 159. *a.* *Forteſc.* Rep. P. 382. *Dugd.* Chron. Ser. P. 90. *Chron. Juridicial.* P. 165.

Sir *Edward Saunders*, Knight, Chief Justice of *England*, in the same Reign, was made so from a Judge of the *Common Pleas*, but did not surrender his Patent, yet it was a Surrender in Law, otherwise he would be intitled to the Fees of both Places. *Dy.* P. 159. *Forteſc.* Rep. P. 383. *Spelm.* Gloss. P. 343. *Dugd.* Chron. Ser. P. 90. *Chron. Juridicial.* P. 165.

Sir *Edward Littleton*, Chief Justice of the *Common Bench*, to *Charles* the *first*, was made Lord Keeper of the Great Seal, and yet, notwithstanding he continued Chief Justice of the *Common Bench*, and the said Lord Keeper sat in the *Common Bench*, as Chief Justice there, not in his Robes, but in his long Gown and Hat,

as the Lord Keeper uſeth to ſit, and ſwore a Philacer there, which Office he gave as Chief Juſtice of the *Common Bench*, and afterwards went into *Chancery*. *Cro. Car.* Rep. P. 600. pl. 2. *Dugd. Chron.* Ser. P. 110. *Chron. Juridicial.* P. 193. *Cro. Car.* Rep. P. 568.

Sir *Orlando Bridgman*, Knight and Baronet, Chief Juſtice of the *Common Pleas*, to King *Charles* the *ſecond*, was made Lord Keeper of the Great Seal of *England*, and yet he continued Chief Juſtice of the *Common Pleas*: And it was ſaid, that theſe two Places were not inconſiſtent. *Sid.* Rep. P. 338. pl. 1. His Lordſhip took Fines, *&c.* in his Chamber, and received the Profits, but did not ſit in Court. *Sid.* Rep. P. 365. pl. 2. *Forteſc.* Rep. P. 392. *Sid.* Rep. P. 3. *Dugd. Chron.* Ser. P. 114, 116. *Chron. Juridicial.* P. 199, 203.

The Earl of *Hardwicke* was Lord High Chancellor, as well as Chief Juſtice of the *King's-Bench*, and his Lordſhip came into the *King's-Bench* Court, 29 *April*, in *Eaſter* Term, 1736, 10 *Geo.* 2. took the Oaths, and heard Mr. Solicitor *Stranges*'s Motion. *Stra.* Rep. 2 Vol. P. 1071. *Kel.* Rep. P. 134. *Andr.* Rep. P. 1. Append. to *Chron. Juridicial.* P. 10.

To conclude, it is recent in every Body's Memory, that on the Reſignation of the Earl of *Hardwicke*, and Appointment of the late Lord Chief Juſtice *Willes*, Mr. Juſtice *Wilmot*, and Mr. Baron *Smythe*, Lords Commiſſioners for the Cuſtody of the Great Seal of *Great-Britain*, they continued Juſtices of their reſpective Courts all the Time they were Commiſſioners.

It is not doubted, but that upon diligent Search, many more Precedents might be produced, and, perhaps, more pertinent to the Subject, and more in Point than the above; however, theſe already mentioned, may be generally thought ſufficient.

Sir *Robert Raymond* was advanced to the Dignity of Peerage, by the Stile and Title of Lord *Raymond*, Baron of *Abbots-Langley*, in the County of *Hertford*, by Letters Patent, dated 15 *January*, 1730, 4 *Geo.* 2. [This Title is now extinct. *Addenda* to 5 Vol. *Collins*'s Peerage] 5 Vol. P. 365. On the 29th of *June* following, his Lordſhip was elected one of the Governors of the *Charter-Houſe*, in the Room of *Thomas* Lord *Trevor*, deceaſed.

His Lordſhip departed this Life [2 *Stra* Rep. P. 948. *Kel.* Rep. P. 243.] at his Houſe in *Red-Lyon Square*, in the 60th Year of his Age, on the 15th of *April*, 1732, and was buried at *Abbots-Langley* in *Hertfordſhire*, where a Monument is erected to his Memory. Note; the Inſcription thereon is too long to be inſerted here, but may be ſeen in *Col.* Peer. P. 365.

(l) Theſe are eſteemed exceeding good Reports; the Collector of them was made a Serjeant at Law, 20 *December*, 1714, 1 *Geo.* 1. Append. to *Chron. Juridicial.* P. 11.

(*) Sir

(n) Sir *Bartholomew Shower* was Deputy Recorder under Sir *John Holt*, and held the Sessions often, as he tells us, in 2 Vol. of his Reports, P. 466. He was chosen Recorder two Years afterwards, *viz.* 20 *February*, 1687, 4 *Jam.* 2. *Mait.* Hist. *Lond.* 2 Vol. P. 1206.

(o) He was King's Council, and appointed Solicitor General about *Hilary* Term, 10 *Geo.* 2. 1737. *Stra.* Rep. 2 Vol. P. 1068. And on 13 *November*, 1739, 12 *Geo.* 2. he was chosen Recorder of the City of *London*, [*Mait.* Hist. *Lond.* 2 Vol. P. 1206.] in which Offices he continued till *Michaelmas* Term, 16 *Geo.* 2. 1743, when having received a considerable Addition to his Fortune, and some Degree of Ease and Retirement, being judged proper for his Health; he resigned his Offices of Solicitor General, King's Council, and Recorder of the City of *London*, and left off his Practice at the House of Lords, Council Table, Delegates, and all the Courts in *Westminster-Hall*, except the *King's-Bench*, and there also, at the Afternoon Sittings. His Majesty, when at a private Audience, Sir *John* took Leave of him, expressed himself with the greatest Goodness towards him, and honoured him with his Patent to take Place for Life next to his Attorney General. *Stra.* Rep. 2 Vol. P. 1176.

By Patent, dated 11 *January*, 1749, 22 *Geo.* 2. Sir *John* was created Master of the Rolls, and sworn into Office 12th of the same Month, in which his Honour died about *May* 1754, 27 *Geo.* 2.

TABLE of REFERENCES.

Agent.

B.

C.

Lord

D.

Mis-

Pleas

Q.

Quare

Search

Uſes.

Table of References.

ERRATA.

Introduct.

Page.	Line.	for.	read.
vi	21	twenty-two	twenty-one.
	Note (q)	1 Vol.	3 Vol.
3	Note (m)	P. 455.	P. 369.
9	10	*potet*	*patet.*
32	15	ſtuck	ſtruck.
58	10	either from the late King or Queen	without cence either &c.
59	33	was	being.
115	Note (e)	after *Anglicana.*	add 3 Vol.
116	Note (i)	after *Anglican.*	add 3 Vol.
118	21	Barons	*Bacon's.*
131	8	after *of*	add *it.*
141	24	compaired	compared.
153	17	Land	Lands.